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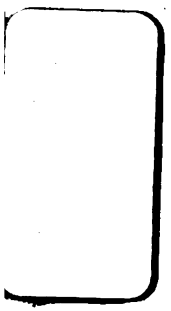

FREDERICK ALLEN

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MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE NINTH.

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VOLUME THE NINTH;

CONTAINING,

Cases argued and decreed in the High Court of Chancery, in the Eighth, Ninth, Tenth and Eleventh Years of George the First. To which are added some Special Cases on Appeals; and an additional Series of Cases in the Court of Chancery during the Time of Lord Hardwicke, from Michaelmas Term in the Tenth Year of George the Second to Trinity Term the Twenty Eighth of George the Second.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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EASTER TERM,

The Eighth of George the Firſt,

IN

The Year

1722,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

---

* Hungerford *againſt* Clay.

Caſe 1.

EDWARD HUNGERFORD, the plaintiff, having mortgaged a houſe in *St. Clement's Lane* in *London* to the defendant *Clay*, tendered the principal ſum and the intereſt to the ſaid mortgagee; which he refuſing to take, he, the plaintiff, exhibited his bill in this court, to have a re-conveyance upon the payment of the ſaid money.

A mortgagee cannot make a leaſe of a houſe in mortgage before foreclоſure, nor preſent on an avoidance.

The ſubſtance of the defendant's anſwer was, that he had made a leaſe of this houſe for five years, reſerving ſo much yearly rent; and that after the expiration of the ſaid term, he had covenanted that the leſſee ſhould hold it for four years longer, if he, the leſſee, was willing ſo to do; that the ſaid five years were now expired; that the leſſee was willing to hold the houſe four years longer; and that if the plaintiff would grant ſuch leaſe, then the defendant would re-convey, upon the payment of the ſaid principal ſum and intereſt.

S. C. 2. Eq. Abr. 610. 2. Veſ. 392. 3. Atk. 518. 1. Wilſ. 34. 1. Powell on Mort. 221. 2. Com. Dig. "Chancery" (4. A. 6.).

This cauſe was heard at THE ROLLS, where the defendant had a decree in his favour;

HUNGERFORD *againſt* CLAY.

But upon an appeal to this court,

IT WAS INSISTED *for the plaintiff*, that as a mortgagee cannot preſent upon the avoidance of a church, ſo, by the courſe of equity, he cannot make a leaſe of a houſe or lands in mortgage, but where there is an abſolute neceſſity ſo to do, which does not appear in this caſe; for if the mortgagee ſhould make ſuch leaſes, they may be avoided by the mortgagor before the equity of redemption is foreclоſed. * Now, admitting the mortgagee ſhould make a leaſe for four years longer, reſerving rent, and ſuch leaſe ſhould be adjudged good between him and the leſſee, it would be difficult for the mortgagor to recover any rent, though the principal and intereſt ſhould be paid, becauſe he does not claim under the eſtate of the mortgagee, and therefore cannot have any benefit of the leaſe made by him; for he is neither party to the deed, nor privy to the eſtate, therefore the mortgagee ought to reconvey free from all incumbrances.

* [2]

THOSE WHO ARGUED *for the defendant*, admitted that a mortgagee cannot preſent upon an avoidance of a church (*a*); the reaſon is, becauſe it does not leſſen his debt; but it is otherwiſe where he makes a leaſe of a houſe or lands in mortgage, rendering rent, for certainly the payment of rent will leſſen the debt; ſo there is no parity of reaſon between thoſe caſes.

BUT THE LORD CHANCELLOR was of opinion, that the mortgagee, before foreclоſure of the equity of redemption, cannot make a leaſe for years of a houſe in mortgage to bind the mortgagor, unleſs to avoid an apparent loſs, and merely in neceſſity (*b*).

So the decree at THE ROLLS was reverſed.

(*a*) See Amhurſt *v.* Dawling, 2. Vern. 401. Attorney General *v.* Scariſbrook, 2. Vern. 550. Gally *v.* Selby, Strange, 403. S. C. Comy. 343. Attorney General *v.* Heſketh, 549. S. C. Prec. C. 214. S. C. 2. Eq. Abr. 377. Jorry *v.* Cox, Prec. Ch. 71. Kinſey *v.* Langham, Caſes T. T. . Gardner *v.* Griffiths, 2. Peer. Wms. 403. Mackenſie *v.* Robinſon, 3. Atk. 559. Botteler *v.* Allington, 3. Atk. 458. Robinſon *v.* Jago, Bunb. 130. Dimocke *v.* Hobart, 1. Brown's P. C. 81.

(*b*) See Lucam *v.* Mertins, 2. Wilſ. 34.

Caſe 2.

Orby *againſt* Trigg.

Equity will not interpoſe on a covenant that a mortgagee ſhall have the benefit of *pre-emption*, if it be not inſiſted on until after the eſtate is ſold.

THE BROTHER of the now plaintiff mortgaged his lands to the defendant, and afterwards died. In the deed of mortgage there was a covenant to reconvey upon ſix months notice of the payment of the principal ſum and intereſt; and another covenant, that, in caſe the eſtate was to be ſold, the mortgagee ſhould have the pre-emption. After the death of the brother, who was the mortgagor, his widow delivered up the counterpart of the mortgage to the attorney of the mortgagee.

S. C. 2. Eq. Abr. 599. 1. Powell on Mort. 140. Fonbl. Eq. 321. 384.

The

The plaintiff having given the defendant ſix months notice, that he would pay the principal and intereſt, and having it ready to pay, the defendant refuſed to accept it.

ORBY *againſt* TRIGG.

The plaintiff thereupon exhibited his bill for a reconveyance of the eſtate, having entered into articles with a purchaſer for the ſale thereof.

The defendant, by his anſwer, inſiſted on the covenant in the deed to have the *pre-emption*.

But it appearing, that neither the plaintiff nor the purchaſer knew anything of this * covenant, for that the counterpart of the mortgage was delivered up as aforeſaid; and that the plaintiff had often made application to the mortgagee for a copy thereof, which was as often denied, he inſiſting only to have the principal and intereſt paid, for that the ſecurity was too narrow for the money which he had lent; and that if it was not paid by ſuch a time, he would foreclose the equity of redemption, but never mentioned that he was to have the benefit of *pre-emption* until after the eſtate was ſold; therefore he ought not now to claim it, to the prejudice of the purchaſer and of the plaintiff, having ſo long time for that purpoſe before the eſtate was ſold. * [3]

And IT WAS DECREED accordingly, and the mortgagee to reconvey upon payment of the principal and intereſt, &c.

Ayliffe *againſt* Tracy.

Caſe 3.

UPON A BILL exhibited againſt the executors of *Sir Thomas Haſelwood*, the caſe appears to be thus:

The father agreed to give his daughter 3000l. as a marriage portion with the plaintiff, and having deviſed 2000l. to her died before the marriage. It was decreed that the huſband ſhall not have the other 1000l. becauſe he knew that 2000l. was deviſed to her, and having accepted that legacy in marriage, ſhall have no more.—S. C. 2. Peer. Wms. 65. S. C. 2. Eq. Ab. 19. 50. 1. Vern. 68. 2. Vern. 202. 1. Eq. Abr. 21. Stra. 738. 1. Vezey, 530. Amb. 424. 3. Com. Dig. "Chancery" (3. Z. 2.). 1. Fontbl. Eq. 179.

An agreement was made in the year 1720 between the plaintiff and *Sir Thomas*, that he the ſaid plaintiff ſhould marry the daughter of *Sir Thomas*, by which agreement the plaintiff was to ſettle ſo much lands in jointure, in conſideration of the ſaid marriage, and of three thouſand pounds to be paid to him as the marriage-portion (*a*). The marriage took effect, and four years before

(*a*) *Mr. Peere Williams* ſtates the caſe thus:—*Ayliffe* courted one of the daughters of *Sir Thomas Haſelwood*, and treated with the father about the marriage; the father conſented to the marriage, and wrote to his daughter, intimating that he had met *Mr. Ayliffe*, and had agreed to give him 3000l. as a portion, which, *Sir Thomas* ſaid, he (*Ayliffe*) ſeemed fully to aſſent to, and that they were to meet the next day, when the affair was to be fully concluded; and ſubſcribed his name to the letter: That they met accordingly and agreed to the marriage; and the father gave money to the daughter to buy her wedding-clothes; that the wedding-day was appointed; but that before the day arrived *Sir Thomas* died; having made his will long antecedent to this treaty of marriage, and given his daughter only 2000l. That the daughter did not ſhew the letter to *Ayliffe*, whom ſhe afterwards married. S. C. 2. Peer. Wms. 65. See Douglas *v.* Vincent, 2. Vern. 202.

AYLIFFE *againſt* TRACY.

this agreement was made, *viz.* in the year 1716, *Sir Thomas Haſelwood* made his will, and thereby deviſed to his ſaid daughter the ſum of two thouſand pounds and no more; and before the ſaid marriage was had, *Sir Thomas* died ſuddenly.

And now the plaintiff exhibited this bill againſt his executors, to have the other thouſand pounds paid to him, according to the ſaid marriage-agreement.

THE COURT was of opinion, that the plaintiff might have had ſome colourable pretence to this thouſand pounds, if, before his marriage with the daughter, he had not known that her father had deviſed two thouſand pounds to her, and no more; but having married the daughter, and accepted that legacy, he ſhall recover
*[4] no more. * Beſides, if this thouſand pounds had been recoverable, it muſt be in right of the huſband alone, for his wife has no manner of right; therefore if he die before it is recovered, his executors or adminiſtrators, and not the wife, will be entitled to it; ſo that he ought rather to have exhibited his bill for the whole three thouſand pounds than for one thouſand pounds reſidue thereof, becauſe the two thouſand pounds he received by virtue of the will, can be no part of the three thouſand pounds upon the marriage-agreement.

So the bill was diſmiſſed with coſts (*a*).

(*a*) Nothing appears in the Regiſter Book but the order of diſmiſſal, Reg. Lib. A. 1721. fol. 285.

TRINITY

TRINITY TERM,

The Eighth of George the Firſt,

IN

The Year

1722,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Gore *againſt* Gore.

Caſe 4.

THIS CASE upon the pleadings was agreed on both ſides to be as follows:

Deviſe to the eldeſt ſon of his eldeſt ſon in tail male, and for want of ſuch iſſue to the uſe of his ſecond ſon in tail male; he ſhall take immediately.

S. C. 10. Mod. 501.
S. C. 2. Peer. Wms. 28.
S. C. 2. Eq. Ab. 339.
S. C. 2. Bar. 209. 229. 355.
S. C. 2. Stra. 958.
Feame Ex. Dev. 432. 2. Vezey, 243. Dougl. 470. 3. Term Rep. 143.

The father being ſeiſed in fee, deviſed his lands to truſtees, and their heirs, executors, &c. for the term of five hundred years upon ſuch truſts as by his will ſhould be declared; and from and after the expiration, or other ſooner determination of the ſaid term and eſtate, then to the uſe of the eldeſt ſon of his the ſaid teſtator's eldeſt ſon, and the heirs males of his body; and for default of ſuch iſſue to the uſe of his, the ſaid teſtator's, ſecond ſon, and the heirs males of his body; with ſeveral remainders over in tail. The father died, and his eldeſt ſon having no iſſue, the ſecond ſon claimed the eſtate as the iſſue in tail male.

And upon the hearing this cauſe, the caſe was thus ſtated, and referred to the Judges of the king's bench for their opinion, who

2. Kel. 854. pl. 203. See 8. Vin. Abr. 370. pl. 14. Cro. Eliz. 878. Lutw. 793.

Gore *against* Gore.

ſhould have this eſtate, either the ſecond ſon of the * teſtator, or whether the fee-ſimple ſhould remain in the truſtees until his eldeſt ſon ſhould have a ſon?

And upon hearing Counſel on both ſides,

IT WAS THE OPINION OF THE JUDGES, that the ſecond ſon of the teſtator ſhould take immediately upon his, the teſtator's, death: and their reaſons were,

FIRST, Becauſe the ſon of the eldeſt ſon, not yet born, could not take by way of remainder, becauſe there was no particular eſtate to ſupport it; neither could he take by way of executory deviſe; ſo that if the fee-ſimple ſhould deſcend on the heir at law of the teſtator, and veſt in him until this contingency of the birth of his eldeſt ſon ſhould happen, it would tend to a perpetuity.

Where a reference is to the Judges on a caſe ſtated, no writ o. error will lie on their judgment.

Now this caſe coming back to the Court upon the Judges certificate of their opinions, it was moved that it might be argued again; becauſe being referred to them by way of caſe ſtated, no writ of error would lie upon their judgment.

If they certify their reaſons, the Court may conſider of it.

THE COURT declared, that where a caſe is referred to the Judges for their opinion, it ſhall conclude this Court. It is true, it is not ſo when they come into court, and give their opinions here; but the Judges having certified their reaſons for their opinions, this Court may conſider thereof, like a general verdict at common law, which concludes the judgment of the Court; but if the jury ſpecify their reaſons for ſuch verdict, it is otherwiſe. So where the king grants a thing *ex mero motu*, without any expreſs conſideration, ſuch grant is good; but where the conſideration is expreſſed in the grant, and it is either wrong or falſe, it makes the whole grant void, if the conſideration is not executed, for this holds only where the conſideration is executory.

Hob. 222.

Now if the parties ſhould reſt under this opinion of the Judges, there would be an end of the cauſe. And as this is a point which ought not to be determined by the opinion of any one Court, but to have a final determination in a proper method; therefore it was ordered, that Counſel ſhould ſpeak to this point at the hearing this cauſe, ſo that it may come before THE HOUSE OF LORDS upon an appeal, if either of the parties ſhould think fit; but they agreed.

See the caſe of Boothby v. Vernon; poſt. 148.

Afterwards the teſtator's ſecond ſon died without iſſue, whereupon *D.* a next remainder-man, bringing this matter yet once more into *Chancery* in *Lord Chancellor* TALBOT's time, his lordſhip referred this matter again to the Judges of the court of king's bench, who certified that they thought the remainder good, and that an interim eſtate, until the birth of the ſon of the teſtator's eldeſt ſon, and who was ſince born, deſcended to the teſtator's eldeſt ſon, and ſo the contingent remainder ſupported, as *Mr. Viner* heard (*a*).

(*a*) See 8. Vin. Abr. 370. pl. 14. *notis.*—See alſo 2. Peer. Wms. 64. where the two certificates in this caſe are ſtated.

The

The Mayor and Burgeſſes of Coventry *againſt* Lord Craven and Others.

Caſe 5.

AN INFORMATION had been formerly exhibited againſt the mayor, &c. for miſapplying a charity; and upon a bill likewiſe brought againſt him in this court, it was made appear, that the magiſtrates of *Coventry* had taken four thouſand pounds of this charity to their own uſe; and thereupon it was decreed, that they ſhould repay that money by ſuch a time, or that the lands thus given for this charity ſhould be conveyed to other perſons for the purpoſes aforeſaid. But the magiſtrates not complying with this decree in paying the money, and not being able to advance the ſaid ſum of four thouſand pounds, the ſaid decretal order was ſigned, enrolled, and exemplified under the great ſeal; and by virtue thereof the ſaid lands were conveyed to *Lord Craven*, and to twenty-nine other perſons, and to their heirs, in truſt, and for the benefit of the poor of that place,

Qu. Whether an *original bill* can be brought to alter a decree ſigned and enrolled.

Caſ. Ch. 5.

And now the plaintiffs exhibited an *original bill* againſt the ſaid truſtees to have a reconveyance of theſe lands, upon payment of the ſaid four thouſand pounds, for that the donor having appointed the mayor for the time being, &c. to be truſtees and overſeers of theſe poor people, the lands ought not to be taken from them, but upon ſome great miſdemeanor of their own; and that the reaſon for which they had been taken away was now of no force, for that the money was ready to be paid in full ſatisfaction for the faults of their predeceſſors; and that ſuch reconveyance ought to be made the rather, becauſe moſt of the members of the corporation in whoſe time this money was miſapplied, were now dead, ſo that there could be no room for conteſting their right to thoſe lands; and for that, the mayor, &c. being a body politic, the now members of that body ought not to be damnified by the faults of their predeceſſors.

It is true, the former decree made againſt the now plaintiffs the mayor, &c. is ſigned and enrolled, and exemplified under the great ſeal; but yet the plaintiffs may have relief upon an *original bill* againſt ſuch a decree (*a*); as for inſtance, The wife, after ſeparation from her huſband, had a decree in this court for alimony (*b*), which decree was affirmed upon a *bill of review*, and likewiſe upon an appeal in the houſe of peers; but the huſband being willing to be reconciled to his wife, exhibited an *original bill* to ſet aſide * the ſaid decree; and though it was confirmed with ſo much ſolemnity, yet the *Lord Keeper* FINCH, being aſſiſted by the Judges, did agree, that it was a proper bill, and the huſband was relieved (*c*).

*[7]

Therefore IT WAS INSISTED *for the plaintiffs*, that they being willing to perform every thing in the former decree, the lands ought not to be taken from them, but that they

(*a*) See Wortley *v.* Birkhead, 3. Atk. 809. S. C. 2. Vezey, 571. Taylor *v.* Sharp, 3. Peer. Wms. 371. Gould *v.* Tancred, 2. Peer. Wms. 534. Norris *v.* Le Neve, 3. Atk. 26. Muſſell *v.* Morgan, 3. Brown's C. C. 74.

(*b*) The caſe of Whorewood *v.* Whorewood, 1. Ch. Rep. 250. Ch. Caſes, 153.—See alſo 2. Com. Dig. "Chancery" (Y. 7.).

(*c*) Caſes in Ch. 251. Eq. Abr. 67. 2. Com. Dig. "Chancery" (2. I. 2.).

THE MAYOR AND BURGESSES OF COVENTRY *againſt* LORD CRAVEN AND OTHERS.

ought to have a reconveyance: beſides, an original bill is proper where a decree hath been already obtained, for it may appear that ſuch decree was obtained upon ſome precedent fraud or ſurprize; and after a decree to foreclose the equity of redemption, a longer time hath been allowed to pay the principal and intereſt. It is true, in this caſe, the conveyance is abſolute to the defendants and their heirs; but it is ſtill a conveyance under the decree of this Court, which is conditional, and like a conditional ſurrender and an abſolute admittance, which muſt be made conditional, according to the ſurrender out of which it ariſes.

See Norris v. Le Neve, 3. Atk. 25.

IT WAS INSISTED *for the defendants*, that this is a very improper bill, and not within the rules of this court, as it appears by a printed copy of thoſe rules now produced; for amongſt the reſt it appears, that no decree ſhall be varied or altered, after it is exemplified under the great ſeal, unleſs for error in law or fact appearing in the very body of ſuch decree, or by matter ariſing ſince the decree, or upon ſome evidence which could not be had at the time the decree was made. It is true, the plaintiffs offer now to pay the four thouſand pounds, which they have raiſed out of other lands given to them in truſt likewiſe for a charity, and for which there is an information already filed againſt them; ſo that if a reconveyance of the lands now in queſtion ſhould be decreed for them, and the plaintiff in the information ſhould prevail, they might raiſe money out of the lands thus reconveyed, to ſatisfy the other charge againſt them.

Patterſon v. Slaughter, Amb. 293.

THE COURT made no decree, but would conſider the caſe of *Whorewood v. Whorewood*, which is truly cited as above.

*[8]

Caſe 6.

Anneſly *againſt* Palmer.

If there be two wills, the firſt deviſing the real eſtate to charitable uſes, and the perſonal eſtate to particular legatees; and the ſecond bequeathing the perſonalty to other legatees and the real eſtate to ſuch uſes as the teſtator ſhould declare, and a probate be granted of the firſt will, ſuch probate is concluſive againſt the claimants under the ſecond will, until reverſed by commiſſion of review.

THE CASE was thus: The teſtator made one will in the year 1708, and about four years afterwards, *viz.* in the year 1712, he made another will; and * by the firſt he deviſed all his real eſtate to charitable uſes, and all his perſonal eſtate to particular legatees therein mentioned; and by his other and laſt will he deviſed his perſonal eſtate to other perſons, and all his real eſtate to ſuch uſes as he ſhould afterwards declare concerning the ſame, but died before he made any declaration of ſuch uſes.

Afterwards, upon a conteſt between the executors of both the wills, the firſt was proved in the ſpiritual court; and that probate was confirmed upon an appeal to the delegates; and upon this conteſt one of the executors having alledged, that the teſtator, *Sir William Robinſon*, died without heirs, it was proved, that *Sarah Palmer*, the wife of the now plaintiff, was his heir at law. Whereupon ſhe and her huſband entered on the greateſt part of the real eſtate, ſuppoſing that the firſt will, by which that eſtate was deviſed to a charity, was revoked by making another will;

and

and the teſtator dying without making any other diſpoſition thereof, it muſt deſcend to the plaintiff as his heir at law.

ANNESLEY against PALMER.

And now upon a bill exhibited againſt her and her huſband, by thoſe who claimed under the firſt will;

IT WAS INSISTED *for her*, that the ſuit in the ſpiritual court was between the contending executors, and that ſhe, though ſhe was heir at law, was neither party or privy to that ſuit; and therefore ſhe prayed that a decree might be made in her behalf as to the real eſtate, and likewiſe that the firſt will might be ſet aſide as to the perſonal eſtate; for though the probate of that will was confirmed by the delegates, yet it is now evident that it was no will, being revoked by a ſubſequent will.

IT WAS ADMITTED *on the other ſide*, that the making a ſecond will is a revocation of the firſt, but that is not the preſent caſe; for upon an iſſue directed out of this court to try whether the teſtator revoked his will, which he made in the year 1708, the jury found that he did not revoke it, "any otherwiſe than by making "*another will* in the year 1712 (*a*)," which laſt clauſe was omitted by the clerk of the aſſiſe in drawing up the verdict; and on THE POSTEA it was returned generally, "that he did not re-"voke it;" which being neither the act of the jury nor of the Court, application was made to the court of king's bench, to certify that the verdict was drawn up as the jury found it, which was, "that the teſtator did not revoke his firſt will any otherwiſe than "by making *another will*:" and after two motions made in full court for that purpoſe, the Chief Juſtice was inclinable to certify *that it was ſo; but he was over-ruled by the other three Judges, who, though they were ſatisfied in their conſciences that it was ſo, yet would not introduce ſo dangerous a precedent (*b*). *[9]

Therefore it was inſiſted, upon affidavits produced and read of this matter, to falſify that part of the record, either by a new trial, or by any other means the Court ſhould direct.

But admitting the ſecond will ſhould amount to a revocation of the firſt, it ſhall be taken in a court of equity to be only a revocation *pro tanto*, and that is of the perſonal eſtate.

THE COURT. As to the perſonal eſtate, here is a will proved, and that probate confirmed upon an appeal to the delegates, which ſhall conclude all perſons, both in law and equity, to make any demands thereof contrary to the ſaid will. But now here is a ſubſequent will found by verdict, and that to the ſatisfaction of this

See Allen v. Dundas, 3. Term Rep. 125.

(*a*) See the caſe of Hitchins v. Baſſet, 1. Show. 537. Comb. 90. 209. 3. Mod. 203. Salk. 592. Show. P. C. 146.; and the caſe of Rolfe v. Harwood, 3. Wilſ. 497. S. C. on a writ of error, 2. Black. Rep. 937. Cowp. 87. S. C. on an Appeal to Parliament, 7. Brown's P. C. 352. See alſo Powel on Deviſes, 540. 3. Atk. 552. 1. Vezey, 32. Swinb. 15.

(*b*) That a verdict may be amended, ſee 1. Roll. Abr. 203. 4. Co. 52. Cro. Eliz. 112. 150. Cro. Car. 338. Bunb. 283. Stra. 514. 1197. 1. Wilſ. 32. Dougl. 746. 1. Burr. 383.

Court,

ANNESLEY *against* PALMER.

Court; but the probate of the firſt being ſtill in force againſt thoſe who claim under the ſecond (if they deſire it), the Court will grant A COMMISSION OF REVIEW in order to ſet it aſide; but if upon ſuch a commiſſion of review the probate of that will ſhould be confirmed by the delegates, there will be an end of the cauſe, for there cannot be *a review upon a review*.

Pro. Eliz. 571. *Quære*, For there may be a commiſſion of re-examination to examine the ſentence of the delegates.

There was no decree made in the principal caſe.

Caſe 7. Raſhfeild *againſt* Careleſſe.

A deviſe of *five pounds* to a ſole executor "for "the care and "pains he may "ſuſtain in ful-"filling the "truſts of the "will," excludes him from taking the reſidue of the teſtator's perſonal eſtate.—NOTE, Parol evidence was admitted in this caſe, both on the part of *the executor* and *next of kin*, to prove the intention of the teſtator.

THE TESTATRIX, *Elizabeth Smallman* (amongſt other legacies, particularly five pounds to the plaintiff), by her laſt will and teſtament deviſed a legacy of five pounds to the defendant (whom ſhe made ſole executor without making him reſiduary deviſee) "for the care and pains he might ſuſtain in fulfilling the truſts in "her will."

There being a reſiduary part of the perſonal eſtate after the debts and legacies were all ſatisfied and paid, the plaintiff, who was of kin to the teſtatrix, exhibited a bill in this court againſt the executor, for an account of the perſonal eſtate, and to have a diſtributive ſhare thereof; inſiſting, that a ſpecific legacy being deviſed to the executor for his care in ſeeing the will performed, he ſhall be deemed as a truſtee for thoſe amongſt whom the reſiduary eſtate ought to be diſtributed.

WILLIAMS *for the defendant*. The executor is *primâ facie* intitled to the ſurplus; and ſomething muſt be ſhewn to prove the teſtator's intent that he ſhould not have it; for otherwiſe the law gives it him. There have been ſeveral caſes upon this queſtion, how far the deviſe of a ſpecific ſum ſhould bar the executor of the reſidue. In the caſe of *Earl Gainſborough (a)*, the earl by his will deviſed a particular ſum to *his wife (b)*, and made her executor, but made no reſiduary deviſee, becauſe when the Counſel was drawing the bill, he deſired there might be a deviſe of the ſurplus to his executrix, but the Counſel would not put in ſuch a deviſe, telling him that the law of courſe gave the ſurplus to the executor; and upon a bill for a diſtribution, the Counſel giving this evidence, the Court decreed the *reſiduum* to the executrix, it appearing to be the intent of the teſtator. In the caſe of *Baal v. Smith (c)*, a huſband deviſed to his wife ſome plate, and made her executrix, and no deviſe of the reſidue; and it was decreed by LORD HARCOURT, that the deviſe of the plate would not prevent the executrix from having the reſidue. In the caſe of

S. C. 2. Eq. Abr. 416. 424.
S. C. 2. Peer. Wms. 158.
S. C. 1. Stra. 568.
1. Vern. 473.
2. Vern. 674. 677. 737.
1. Peer. Wms. 9. 550.
3. Peer. Wms. 40.
2. Com. Dig. "Chancery" (3. G. 7.).
1. Brown P. C. 154.

(a) 2. Vern. 252. pl. 240.
(b) That a wife is barred by a ſpecific legacy from taking the reſidue, ſee Martin v. Rebowe, 1. Brown's C. C. 154.
(c) 2. Vern. 675. pl. 602.

Littlebury

Littlebury v. Buckly (*a*), in the equity court of the city of *London*, SIR P. KING, *Recorder* of the city and Judge of that court, decreed a diſtribution, there being a particular legacy deviſed to the executor; but that decree was afterwards reverſed in the houſe of lords on collateral evidence, which they admitted to prove the teſtator's intent for the executor to have the ſurplus (*b*).

TALBOT *on ſame ſide.* There are ſeveral caſes where an executor is looked upon only as a truſtee for the next of kin, but they are all founded on the ſuppoſed intent of the teſtator, that the executor was only to have the ſpecific ſum deviſed. But there may be caſes, where it is reaſonable that the executor ſhould have the ſurplus, as well as the ſpecific ſum. It may be preſumed, one reaſon why the teſtator gave a particular ſum, though he intended him the ſurplus, was, leſt there ſhould be no ſurplus (for perſonal eſtate is very uncertain, being always fluctuating), in which caſe the executor has an equitable as well as a legal right. On this foundation the caſes which have been quoted were adjudged. The ſuppoſition of the teſtator's kindneſs to his next of kin is not ſo ſtrong as an expreſs declaration of a teſtator, for which reaſon the houſe of lords have admitted collateral evidence as legal proof, As in the caſe of *Harris v. Biſhop of Lincoln* (*c*), where the teſtator deviſed his eſtate to the right heirs of his mother, and proof was admitted to ſhew, that he intended it for the right heirs of his grandmother, the eſtate coming from her family; and this was held not to be contrary to the will; and in laſt *Eaſter Term* it was accordingly decreed by the preſent LORD CHANCELLOR. The ſtatute has no relation to this caſe, becauſe here is a will; and that act extends only to a dying inteſtate.

TO WHICH *it was anſwered*, that the preſent caſe is not like any of thoſe before cited. And firſt, as to the *Counteſs of Gainſborough's Caſe* (*d*), the ſuit was between the heir at law and the executors, to make the perſonal eſtate in her hands to be aſſets in order to ſatisfy debts, and ſo far to diſcharge the real eſtate, and proof was admitted to ſhew, that *the earl* intended his lady ſhould have all his perſonal eſtate in nature of a legacy, though he had given her a ſpecific legacy in the ſame will. In the caſe of *Littlebury v. Buckley* (*e*) the deviſee expreſſed no reaſon for giving the ſum of money, only a deviſe of ſo much. The caſe of *Harris v. Biſhop of Lincoln* (*f*) was no more than a diſpute concerning the identity of a perſon; and in ſuch caſe parol evidence has been admitted ever ſince the ſtatute of Diſtributions. *Baal v. Smith* (*g*) was a deviſe to a wife (executrix) of plate which ſhe had before marriage; and it was held, that notwithſtanding that legacy, ſhe ſhould have the reſidue. But a proof *dehors* a will was never yet

(*a*) 2. Vern. 677.
(*b*) See the Duke and Dutcheſs of Beaufort's Caſe in the Houſe of Lords, 2. Vern. 648. pl. 578. 8. Viner Abr. 194 pl. 21. *in notis.*
(*c*) 2. Eq. Abr. 416.
(*d*) 2. Vern. 252.
(*e*) 2. Vern. 677. See 10. Mod. 99.
(*f*) 2. Peer. Wms. 137.
(*g*) 2. Vern. 675. pl. 602.

admitted,

RAINFIELD *against* CARELESS.

admitted. It is true, if a will want an explanation, evidence may be given to * explain it, but never where it explains itſelf, as in the preſent caſe; for what can be plainer than a ſpecific legacy given to one for his care and pains in performing a will. This is a legacy which implies a negative ſo as to exclude the legatee from any farther demand out of the perſonal eſtate, *viz.* that he ſhall have ſo much for his pains, and no more; and ſo it was held by the preſent LORD CHANCELLOR in the caſe of *May v. Lewen* (*a*). But it would be of dangerous conſequence to admit any evidence *dehors* a will, and repugnant to the will itſelf, becauſe it is in effect laying aſide the will of the teſtator, and making a new will upon ſuch evidence, which was condemned by the Legiſlature, when the ſtatute of Frauds and Perjuries was made; for to what purpoſe ſhould any man make a will, if it is in the power of any court to ſet it aſide upon proof of any matter *dehors* the will, and make a decree accordingly (*b*)?

* [11]

PARKER, *Lord Chancellor*, being indiſpoſed,

POWYS, *Juſtice* of the king's bench, ſat in court, and made the decree.—This is a queſtion upon a will, and it has been *vexata quæſtio*. The caſe of *Foſter v. Munt* (*c*) was the firſt caſe where the *Lord Chancellor* JEFFERIES was of opinion, that any legacy to an executor occaſioned a diſtribution of the ſurplus; for otherwiſe it is giving all and ſome; the three lords commiſſioners MAYNARD, KECK, and RAWLINSON, upon a re-hearing of the ſame cauſe, reverſed the decree; but that laſt decree was upon appeal to the houſe of lords reverſed, and the firſt confirmed. In *The Duke of Beaufort's Caſe* (*d*), COWPER, *Lord Chancellor*, decreed

(*a*) The caſe of *May v. Lewen* was thus:—*Beatrice Miller*, by her will of 2d *December* 1717, after payment of her debts, legacies, and funeral, deviſed all her lands and tenements, and the rents and profits thereof, and the produce of all her money and other perſonal eſtate, to the plaintiff and the defendant *Lewen* and their heirs, on truſt to ſell the ſaid real and perſonal eſtate, and pay the intereſt of the money ariſing from ſuch ſale to her mother for life; and the teſtatrix then gave ſome ſmall legacies to be paid after the death of the mother, and appointed the plaintiff and defendant *Lewen* executors of her will, and gave them fifty pounds a-piece for their trouble therein; but ſhe made no diſpoſition of the reſidue.—And the Court decreed the executors to be truſtees of the reſidue for the next of kin. Reg. Lib. B. 1720. fo. 196. 2 Peer. Wms. 159. note (1).

(*b*) Proof was admitted in this caſe, both on the part of *the executor* and for the *next of kin*, to ſhew the intention of the teſtatrix reſpecting the reſidue of her eſtate. S. C. 2. Peer. Wms. 158, 159. But it is ſaid to be the only caſe in which parol evidence has been admitted in favour of the *next of kin*. 2. Peer. Wms. 158. *notis*. But parol evidence is conſtantly admitted in equity in favour of *the executors*, in order to rebut the preſumption which the law raiſes againſt their title. Petit *v.* Smith, 1. Peer. Wms. 7. Granville *v.* Beaufort, 1. Peer. Wms. 114. Batchelor *v.* Searle, 2 Vern. 736. Lake *v.* Lake, Amb. 126. Bracebridge *v.* Woodrocff, 2 Atk 68. Brown *v.* Selwin, Caſes T. T. 240. Coote *v.* Boyd, 2. Bro. C. C. 525. Clinton *v.* Hooper, 3. Bro. C. C. 201. Hornſey *v.* Finch, 4. Bro. C. C. 239. Thornton *v.* Tracey, 2. Vezey, jun. 465.

(*c*) 1. Vern. 473. pl. 462. 1. Eq. Caſes Abr. 243. pl. 1. 2. Eq. Caſes Abr. 433. pl. 8. 443. pl. 57. See alſo Martin *v.* Rebowe, 1. Brown's C. C. 154.

(*d*) 2. Vern. 648. pl 587. 8. Viner Abr. 154. pl. 21. *in notis*.

a diſtri-

a diſtribution; but that decree was reverſed by the houſe of lords. In law as well as equity, an executor is eſteemed but a truſtee; for an executor of an executor is continued executor to the firſt teſtator *in infinitum*; but not an adminiſtrator of an executor, for the executor had no property in the perſonal eſtate to go to his adminiſtrator. If a man marry a *feme* adminiſtratrix, who dies, he ſhall not have the goods of her inteſtate; for there ſhall be a diſtribution. This was *Mr. Hartcourt's Caſe* (*a*), who married *Sir James Aſton's* widow. There are many precedents where a ſpecific legacy bars the executor of the ſurplus. There is a diſtinction between giving the executor a legacy generally, and ſpecifying the cauſe for which it is given; for that raiſes a truſt in equity which the executor muſt perform; it is a truſt ſuperadded to the former truſt: it is dangerous to admit evidence *dehors*. The beſt conſtruction is on the will or deed itſelf; for *litera ſcripta manet* (*b*). I once heard it determined, that giving the executor mourning barred him of the ſurplus. In *February* 1720, before LORD PARKER, in the caſe of *May v. Lewin* (*c*), it was decreed, that in caſe of a general legacy to an executor, evidence may be admitted, becauſe every thing depends on implication; but otherwiſe where the cauſe of the legacy is expreſſed. The executor, in this caſe, ſeems to be conſidered barely as a legatee.

RADFIELD *againſt* CARELESS.

Let there be a decree for a total excluſion of the executor; let there be a diſtribution; and to that end let the executor account (*d*).

(*a*)

(*b*) That parol evidence ſhall not be admitted to *contradict* a will, ſee Brown v. Selwin, Caſes T. T. 240. Chamberlain v. Chamberlain, 2. Freem. 52. Lowfield v. Stoneham, 2. Stra. 1261. Hampſhire v. Peirce, 2. Vezey, 217. Maybank v. Brook, 1. Brown's C. C. 84. But that it may be admitted to *aſcertain* a perſon or thing, ſee Harris v. Biſhop of Lincoln, 2. Peer. Wms. 136. Dorſet v. Sweet, Amb. 175. Bradwin v. Harper, Amb. 374. Parſons v. Parſons, 1. Vez. 266. Fonnereau v. Pointz, 1. Brown C. C. 472. Del Mare v. Rebello, 3. Brown C. C. 446.

(*c*) 2. Peer. Wms. 162.

(*d*) See Davers v. Davers, 3. Peer. Wms. 43. Joſlin v. Brewit, Bunb. 112. Southcote v. Watſon, 3. Atk. 228. Andrew v. Clerk, 2. Vezey, 162. Martin v. Rebowe, 1. Brown's C. C. 154. Ruſhdale v. Carleſſe, Stra. 568. Farringdon v. Knightly, 1. Peer. Wms. 544. Rutland v. Rutland, 2. Peer. Wms. 210. Wheeler v. Sheer, Moſley, 288. Read v. Snell, 2. Atk. 642. Bowker v. Hunter, 1. Brown C. C. 328. Batteley v. Windle, 2. Brown C. C. 31. Lawſon v. Copeland, 2. Brown C. C. 156. Dean v. Dalton, 2. Brown C. C. 634. Clennel v. Lewthwaite, 2. Vezey, jun. 465.

Heron *againſt* Newton.

Caſe 8.

At the Rolls.

THE CASE was, That the teſtator by his laſt will and teſtament made two executors, and gave them ſpecific legacies, and by his ſaid will deſired them to be kind to one *Sarah Tuſton*, his old

Where the executor ſhall have the reſiduary part free from

my diſtribution.—3. C. 2. Eq. Abr. 440. Ante, 10. Poſt. 27. 2. Peer. Wms. 160. 2. Atk. 100. 2. Com. Dig. "Chancery" (3. G. 7.).

ſervant,

HERON *against* NEWTON.

ſervant, and to give her ſome ſmall pieces of furniture then in his houſe, if ſhe deſired it.

The queſtion in this caſe was (as in that laſt mentioned), Who ſhould have the reſidue of the perſonal eſtate after debts and legacies paid?

And IT WAS DECREED, that the executors ſhould have it free from diſtribution, it being the apparent intent of the teſtator (*a*) it ſhould be ſo; for otherwiſe they could not be kind to his old ſervant, or give her any part of his * furniture, if it was not theirs to give, and if he left them no *aſſets* for that purpoſe; ſo that thoſe words are explanatory of what the teſtator intended.

* [12]

The bill was diſmiſſed (*b*).

(*a*) Proofs were read of the teſtator's intention. 2. Peer. Wms. 160. 2. Vezey, jun. 473.

(*b*) See Note (1) Peer. Wms. 590.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of George the First,

IN

The Year

1722.

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*
Sir Jeffrey Gilbert, *Knt. Baron of the Exchequer.*
Robert Price, *Eſq. Baron of the Exchequer.*

The Counteſs-Dowager of Coventry *againſt* The Earl of Coventry.

Caſe 9.

THOMAS EARL OF COVENTRY being ſeiſed in fee of ſeveral manors, lands, and tenements, &c. demiſed the ſame to truſtees and their heirs, to the uſe of himſelf for life; remainder to his eldeſt ſon *Gilbert* for life, with a power to ſettle a jointure on any wife he ſhould marry, not exceeding five hundred pounds a-year, ſo as ſhe brought an equivalent fortune; remainder to the heirs males of the body of the ſaid *Gilbert*; remainder to the preſent *Earl* (the now defendant), and the heirs males of the body; with ſeveral remainders over.

Where a defective execution of a power was helped in equity.

S. C. Max. in Eq. 19. S. C. Stra. 596. S. C. 2. Peer. Wms. 222. S. C. Comy. 312. S. C. 1. Eq. Abr. 348. S. C. 2. Eq. Abr. 673. S. C. 10. Mod. 464. Gilb. R. R. 160. 2. Eq. Abr. 87. pl. 9. 660. pl. 8. Powel on Pow. 130.

Earl Thomas died; and thereupon *Earl Gilbert*, being ſeiſed for life as aforeſaid, married the plaintiff, and in conſideration of the ſaid marriage, and of ten thouſand pounds portion which he had with her, entered into articles, by which he covenanted, &c. for himſelf and his heirs, to ſettle lands according to this power, or otherwiſe, of the value of five hundred pounds a-year on her for jointure; and having aſked, and being informed by his ſteward, which

THE COUNTESS-DOWAGER OF COVENTRY *against* THE EARL OF COVENTRY.

which of his lands were the moſt proper to be ſettled, a draught of a ſettlement of lands to that value was drawn and engroſſed for him to ſign, which lay four years, * and was never executed by *Earl Gilbert*; who afterwards being ſuddenly taken ill, deviſed three thouſand pounds to the plaintiff, and all his plate, jewels, &c. and two hundred and fifty pounds a-year to be paid to her for life out of other lands, and died without iſſue-male; ſo that the ſaid manors, lands, and tenements, came to the preſent *Earl* (the now defendant), againſt whom the plaintiff, the *Counteſs-Dowager*, exhibited a bill in this court to have a ſpecific execution of the ſaid power, and that ſhe may retain the lands mentioned in the ſaid ſettlement, though not executed by *Earl Gilbert* in his life-time.

AND IT WAS INSISTED *for her*, that this power given to *Earl Gilbert* (though he had only an eſtate for life) ought to be favourably conſtrued in a court of equity; for wherever ſuch a power is given to a tenant for life, who would have been ſeiſed in fee if it had not been for that deed by which the power itſelf was created, it ſhall receive a more favourable conſtruction than if it had been reſerved to one who is a ſtranger to the inheritance by the rules of deſcent. That it plainly appeared by the proofs in this caſe, that *Earl Gilbert* certainly *intended* to execute this power; for by his direction, a deed was drawn for that purpoſe, which the truſtees for *the Counteſs* diſliking at the time the ſaid *Earl* was about to execute it, he ſent up to *London* to have another deed drawn, which was done, and returned into the country, and was in the poſſeſſion of his ſteward, who being gone from home, *the Earl* died ſuddenly without executing that deed; ſo that if it appear to this Court, that *Earl Gilbert* deſigned to execute it, that ſhall be taken in equity to be good againſt the preſent *Earl*, like a will, which, though not ſigned by the teſtator, is good in equity (*a*) to charge the heir at law in the realty as well as the executor in the perſonalty.

ON THE OTHER SIDE *it was argued*, that not to execute a power punctually was the ſame thing as not to execute it at all; and powers not executed are never helped in this court (*b*), unleſs it is to avoid an apparent injury in conſcience, though in ſtrictneſs of law loſt; which is not the preſent caſe, becauſe it appears, that this lady (the plaintiff) has a very good proviſion made for her by the will of *Earl Gilbert* her late huſband; for he left her a legacy of three thouſand pounds, together with the value of two hundred pounds more of his perſonal eſtate, which, with the two hundred and fifty pounds ſettled on her for life, and payable yearly out of

(*a*) *A feme covert* having a power to diſpoſe of money by will, *ſigned and ſealed* by her, made a teſtamentary paper, not ſealed, but on *a ſtamp*; and the Court held this a good execution of the power, for the ſtamp is equivalent to ſealing, Sprange v. Barnard, 2. Brown C. C. 505.

(*b*) See Arundel v. Philpot, 2. Vern. 69. 3. Ch. Caſes, 70. Pigot v. Penrice, Comy. 250. Tollet v. Tollet, 2. Peer. Wms. 489. M'Adam v. Logan, 3. Brown C. C. 310.

certain

certain lands, is a reasonable equivalent for her fortune. * As to the case of a will, that it shall be good in equity, though not signed by the testator, it has its own reasons; for if he write his name in any part of his will, it is a good signing, and wills are commonly made *in extremis*, and for that reason they are favoured in equity. Now in the present case it appears, that *Earl Gilbert* made a will a little before his death, and he might at the same time have executed the deed, if he had intended so to do; but probably he thought, that he had done enough already for the plaintiff, and therefore would not lay any farther charge on the lands. It is true, the plaintiff brought a considerable portion in money, and so came in as a purchaser for a valuable consideration; but that will be no reason to charge the present *Earl*, because none of it came to his use; but if it charge any one, it must be either the heirs or executors of *Earl Gilbert*; for he covenanted, that he or his heirs would settle five hundred pounds a-year on the plaintiff, which could not be by virtue of the power reserved in the will of *Earl Thomas*, because *Earl Gilbert* had only an estate for life, and consequently could not bind his heirs to settle a jointure by virtue of that power; so that if his heirs are bound, it must be in another respect, but the defendant can never be bound as heir, because he is the remainder-man in tail. It is true, powers reserved in a voluntary settlement, as this was by *Earl Thomas*, ought to be favourably construed in respect to him who made them; but it is not so where powers are joined to an estate to charge that of a stranger; but yet there are cases where powers reserved in and by a voluntary settlement have not received a favourable construction in this court: as for instance, In the case of the *Earl of Mountague v. Bath* (*a*), where a power of revocation was reserved in a deed, but it was to be in the presence of three privy-counsellors, and the *Duke of Albemarle*, who had reserved such power, did by his will revoke the deed; but being at that time governor of *Jamaica*, he could not do it in the presence of three privy-counsellors; it is true, this revocation was held good in equity, but it was upon that particular reason, *viz.* because he could not have three privy-counsellors there. But this Court denied to help the single circumstance of a mistake in the tender of a guinea. So in *Sir Charles Orby's Case* (*b*), which was thus: *The Earl of Macclesfield* was tenant for life, with a power to make leases for twenty-one years, or three lives, so as the * old accustomed yearly rent was reserved; he made a lease for three lives, without any special reservation, but only yielding and paying the old-accustomed rent generally; and this was held a void lease. This Court will not decree the execution of a power to the prejudice of a third person, when the time for executing that power is lapsed. Now a power given to tenant for life to make leases, or to settle a jointure, should be strictly * [15]

(*a*) 2. Chan. Rep. 417. 3. Chan. Cases, 55. 68. 90. 2. Com. Dig. "Chancery" (4. O. 4.).

(*b*) Orby *v.* Lord Mohun, Easter Term, 4. *Anne*. 1. Eq. Abr. 343. 2. Freem. 291. 2. Vern. 531. Rep. in Equity, 45. Prec. in Ch. 257. 3. Chan. Rep. 102.

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See Hele *v.* Hele, 2. Cases in Chancery, 28, 29.

conſtrued, becauſe it enlarges the eſtate for life beyond its natural duration, to the prejudice of thoſe in reverſion or remainder. So where a woman made a ſettlement of her lands, with a power to revoke it at any time in favour of her huſband, and ſhe afterwards ſent ſeveral letters to her lawyer to prepare a deed to revoke that ſettlement, and to give the eſtate to her heir, but never executed ſuch deed, this Court refuſed to make a decree according to what appeared to be her intention by thoſe letters; for the decree ought to be founded on what ſhe had done, and not on what ſhe intended to do.

In the principal caſe, no decree was now made, the Lord Chancellor taking time to conſult the Judges.

Afterwards this caſe was argued again in *Eaſter Term*, in the tenth year of *George the Firſt*, before the LORD CHANCELLOR, aſſiſted by THE MASTER OF THE ROLLS and BARON PRICE and BARON GILBERT.

The ſubſtance of the arguments for the plaintiff was as follows: This bill was brought to have a jointure intended to be ſettled on the plaintiff by virtue of a power in the will of *Thomas Earl of Coventry*, which provides, that it ſhall be lawful for any perſon who ſhall be ſeiſed, &c. by virtue of the ſaid will, to ſettle five hundred pounds a-year on any wife he ſhould marry, ſhe bringing an equivalent fortune. The teſtator died, and *Earl Gilbert*, being ſeiſed of the eſtate for his life, entered into articles to truſtees, &c. upon his intermarriage with the plaintiff, by which he covenanted to ſettle lands purſuant to his power, or otherwiſe, of the value of five hundred pounds a-year, on her, and got a draught of a ſettlement to carry the ſaid articles into execution, in which this power was mentioned, and directed, that a mortgage which affected ſome of the lands ſhould be diſcharged, in order to make the ſettlement more effectual; and this bill being brought in the diſjunctive, *either* to be quieted in the poſſeſſion of the lands mentioned in the ſettlement thus drawn, or to have ſatisfaction from
* [16] the * heir of *Earl Gilbert*, this Court directed an account to be taken what aſſets of *Earl Gilbert* came to his heirs, which, on the report made thereof, fell ſhort ſome thouſand pounds to ſatisfy the plaintiff's demands. And thereupon IT WAS NOW ARGUED, that theſe articles ought to be carried into execution; and the rather, becauſe the plaintiff is a purchaſer for a valuable conſideration, and the defendant is only a volunteer under the will of *Earl Thomas*, the caſe being ſtrictly as followeth: Tenant for life, without impeachment of waſte, with a power to ſettle five hundred pounds a-year on any wife he ſhould marry, and who ſhould bring an equivalent fortune, remainder to the defendant, &c. Tenant for life, upon his marriage, entered into articles, by which he covenanted to ſettle five hundred pounds a-year on his intended wife; and in purſuance of this covenant, a ſettlement of lands was drawn by his direction, but he died before he executed the ſaid deed: now it is a general rule in equity, that where there is a purchaſer

for

for a valuable conſideration, on articles only, without any other conveyance, thoſe articles ſhall be carried into execution; and as this is often done in the caſe of an heir, on the articles of his anceſtor, ſo it ought to be done in the preſent caſe. And thoſe caſes where the Court would not compel the execution of powers are, where it would be againſt the will of the donor they ſhould be executed. Such was the caſe of the heir in tail, where this Court would not enforce him to ſuffer a common recovery, though his father was decreed ſo to do, and died in contempt for not doing it. It is true, where a power is not executed at all, but totally neglected, there may be ſome reaſon for a court of equity not to enforce the execution thereof; but where it is executed in any part, though not ſtrictly performed, it is the ſtanding rule of this court to make it good. Now, upon conſideration of the circumſtances of this caſe, and the ſolemnity of the tranſactions, by drawing a ſettlement purſuant to the articles, and by the expreſs direction of *Earl Gilbert*, this is a good execution of his power in equity. Beſides, the ſtrict execution of this power was prevented by an accident; for *Earl Gilbert* called for this ſettlement in his laſt ſickneſs, which was ready engroſſed, and in the poſſeſſion of his ſteward, who being then gone from home, it could not be had for him to execute before he died, ſo that the plaintiff has good equity even upon that foot; and there are * ſeveral precedents where articles have been carried into execution againſt remainder-men; as the caſe of the *Lord Burlington v. Clifford* (*a*) and *Hollingſhed v. Hollingſhed* (*b*), and *Parker v. Parker* (*c*), for younger children's portions, and *Alford v. Alford* (*d*); in which laſt caſe the perſon who had the power covenanted to execute it before he had it, and whilſt it was in contingency, but it afterwards veſted in the covenantor, and not being executed by him, it was carried into execution againſt the remainder-man; and ſo ſhould this.

* [17]

THOSE WHO ARGUED *for the defendant* admitted, that the plaintiff was a purchaſer in the higheſt ſenſe, and for the moſt valuable conſideration, which is marriage, and a portion in marriage; yet where ſhe is ſuch a purchaſer at large, and of no particular lands, ſhe muſt take her remedy where the law gives it, and that cannot be of thoſe lands, for certainly ſhe is no purchaſer thereof at law. There are three things relied on by her Counſel to make her a purchaſer in this court; and thoſe are, the articles, the drawing the ſettlement purſuant to the ſaid articles, and the will of *Earl Thomas*; and that though one of theſe might not do it, yet *juncta juvant*. It has been ſaid, that every wife who brings an equivalent fortune is a purchaſer of thoſe lands under that will and the power thereby created; but this is a very poſition, becauſe it is eſſential that every power ſhould be *ad libitum* of him who has it until it is executed, ſo that the plaintiff cannot be ſaid to be a

(*a*) 1. Eq. Abr. 345. 3. Vern. 379. Rep. in Equity, 167.
(*b*) 1. Gilb. Rep. in Eq. 167.
(*c*) Gilb. Rep. in Eq. 168.
(*d*) Gilb. Rep. Eq. 167. 2. Eq. Abr. 659.

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purchaſer under this will and power before that power is executed. And as to the articles ſo much relied on and the covenant therein mentioned, to ſettle five hundred pounds a-year, it is only a general covenant relating to no particular eſtate or lands; therefore the plaintiff is only a creditor under that covenant at large, which is not like the caſe of *Hollingſhed v. Hollingſhed* (*a*); for there the covenant was tied to the very lands in the power, and there were no other to anſwer it. It is true, that ſpecial forms of words are not neceſſary in executing powers, and that *infants* and *femes covert* may perform the ſame, becauſe they are only inſtruments (*b*). It is true likewiſe, that in the *Lord Burlington's Caſe* there was a general covenant, but it did not reſt there, for he ſettled what he pretended was a thouſand pounds a-year, according to the articles, which was afterwards found to be of leſs value, and appeared ſo to
* [18] be by the defendant's anſwer. * But the caſe of the mortgagee, who had a decree in this court againſt the mortgagor (who was tenant in tail) to ſuffer a common recovery, and died in contempt of the Court in not performing the ſaid decree, yet the Court would not carry that decree into execution againſt the heir in tail, is a very ſtrong caſe againſt the plaintiff, *Lady Coventry*; for in that caſe the tenant in tail had an implied power to ſuffer a common recovery, by virtue of that eſtate which he had in the lands, and he himſelf might have been compelled to do it if he had been living, but after his death his heir was not; and yet he in a greater meaſure derived his eſtate under his anceſtor, who was tenant in tail, than the preſent defendant does under *Earl Gilbert*. It is true, a tenant in tail has power only by implication in law to ſuffer a common recovery; but there ſeems to be no material difference between implied and expreſs powers; for wherever the parties are on a level as volunteers, this Court will never interpoſe to favour one more than the other. It is admitted, that in this caſe ſome ſteps were taken towards a future act, but ſtill all reſted in intention; and it ſeems reaſonable to have this power or this covenant carried into execution, if there was no other way by which it might be ſatisfied; but it is plain there were other means by which it may be ſatisfied, and that is by the perſonal aſſets of *Earl Gilbert*; therefore a ſpecific execution of this power ought not to be decreed.

THE JUDGES who aſſiſted THE LORD CHANCELLOR divided this caſe into two points:

FIRST, Whether anything was done by *Earl Gilbert* in conſequence of this power to make it *a lien* on the defendant, who was a remainder-man.

SECONDLY, If any ſuch thing was done, then whether the defendant has any equity to be reimburſed out of the aſſets of *Earl Gilbert*.

(*a*) Gilb. Eq. Rep. 167.
(*b*) *Contra* as to infants, by VERNEY, *Maſter of the Rolls*. 9. Vinor Abr. 403. in note, pl. 1.

As

As to THE FIRST QUESTION they held, that *Earl Gilbert* had ſo far executed the power as to be *a lien* on the eſtate in the hands of the remainder-man. When powers were firſt created by the ſtatute 27. *Hen.* 8. c. 10. they were ſtrictly conſtrued at law, and the reaſon was to avoid recalling and unſettling eſtates already ſettled; and probably for the ſame reaſon ſuch powers had no countenance in this court. * But the power in the preſent caſe, which is reſerved to a tenant for life to raiſe an eſtate, is part of the old dominion which the donor had over his eſtate, and agreeable to his intention at the very time he made ſuch reſervation; and therefore ſhould have a favourable conſtruction in this court. That the price here given (*i. e.*) the portion paid, and the articles executed, are a complete conveyance, and a good execution of this power; and that ever ſince the execution of theſe articles, *Earl Gilbert* was a truſtee for the plaintiff, and ſuch truſt is aſſignable and deviſable in this court. That there is but one caſe cited at the bar againſt this opinion, and that is the caſe of a mortgagor, who was tenant in tail, and was decreed to ſuffer a common recovery, but died in contempt of that decree, and this Court would not carry it in execution againſt the heir; but the reaſon may be, becauſe the heir, after the death of his anceſtor, was in by the *ſtatute De Donis*, which this Court could not controul; but if the anceſtor had been *ceſtuy que truſt* in tail, his heir would have been bound by ſuch anceſtor's lien, becauſe in that caſe he would not have been in by that ſtatute. It has been argued at the bar, that theſe articles ſhall not be carried into a ſpecific execution in favour of a volunteer, when there is a plain remedy to be had on the covenant for damages; but that is only where a man is *ad libitum* to perform it or not. If the truſtees by the marriage-articles had exhibited a bill in this court to have a ſpecific execution thereof, it would certainly have been decreed for him; and ſo ought it to be for the plaintiff, eſpecially ſince the power created by the will of *Earl Thomas* covers all the eſtate which he ſettled by that will. Upon the whole, it might be hard for a court of equity to carry the ſettlement alone, thus drawn and engroſſed, into the execution of this power excluſive of the articles, becauſe the ſtatute of Frauds now ſtands in the way; but this power being bound by the articles, the very draught of that ſettlement is a good deſignation of what lands ſhould be ſettled, and a determination of *Earl Gilbert's* election to raiſe the five hundred pounds a-year out of, and by virtue of, his power.

* [19]

Say v. Freeland, 2. Vent. 350.

As to THE SECOND POINT, which is, Whether the defendant has any equity to be reimburſed out of the aſſets of *Earl* * *Gilbert*, (*i. e.*) how far thoſe articles will bind his heirs? And as to that matter, the words are to be conſidered, *viz.* "that he or his heirs "would ſettle lands of the value of five hundred pounds a-year, by "virtue of his power, or otherwiſe:" now it has been ſaid at the bar, that theſe are technical words written *currente calamo*, and inſerted in the articles without conſideration; but this ſeems to be a miſtake,

* [20]

2. Com. Dig. 673.

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miſtake, for the words were carefully put in as auxiliary to the real lien, *viz.* that if his power ſhould happen to be inſufficient to ſettle five hundred pounds a-year, that then it ſhould be done by ſome other means; and it is probable this marriage had never taken effect but in conſideration of this power; ſo that the aſſets of *Earl Gilbert* ſhall not come in exoneration of the ſettled eſtate; for wherever aſſets are brought in exoneration, there the debt originally charged the perſonalty. It is true, he had election to raiſe this five hundred pounds a-year out of his own aſſets, or out of his power; but it ſeems plain, that he intended to raiſe it out of his power; for here was a deed drawn and engroſſed, though not executed, by which deed the lands therein mentioned, being of the value of five hundred pounds, were ſettled on the plaintiff in jointure; ſo that this initiate act, though not conſummate, is ſufficient to ſhew his intention to execute this power, which he was bound by the articles to perform; but if it had been *ad libitum*, there an initiate act would not have been ſufficient.

IT WAS DECREED for the plaintiff, that ſhe was a purchaſer of this five hundred pounds a-year under the will of *Earl Thomas* and the articles of *Earl Gilbert*; and that though this power was not ſtrictly performed, yet here being a valuable conſideration, it ſhall be carried into execution in this court; that the articles are a ſufficient *lien* in equity to carry it into execution; and this being *a lien* ever ſince the articles were executed, there can be no colour to charge the aſſets of *Earl Gilbert*.

SO IT WAS DECREED, that the plaintiff ſhould have thoſe very lands ſpecified in the deed (*a*).

(*a*) For inſtances in which a court of equity will ſupply defective execution of powers, ſee Pollard *v.* Grenvill, 1. Ch. Caſes, 10. 1. Ch. Rep. 184. Smith *v.* Aſhton, 1. Freem. 308. Fothergil *v.* Fothergil, 2. Freem. 256. Garth *v.* Blanfrey, Gilb. E. R. 169. Tollet *v.* Tollet, 2. Peer. Wms. 489. Harvey *v.* Harvey, 1. Atk. 562. Gotter *v.* Layer, 2. Peer. Wms. 622. Holt *v.* Holt, 2. Peer. Wms. 648. Wade *v.* Paget, 1. Brown C. C. 363. Sneed *v.* Sneed, Amb. 64. Wilſon *v.* Piggott, 2. Vezey, jun. 351. Jackſon *v.* Jackſon, 4. Brown C. C. 467.

EASTER TERM,

The Ninth of George the First,

IN

The Year

1722,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

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* The Earl of Strafford *against* Lady Wentworth. Case 10.

If a tenant for life make a lease for years, reserving rent at *Lady-Day* and *Michaelmas*, and die intestate about two o'clock in the afternoon on *Michaelmas-Day*, and the tenants pay the rent to the *remainder-man*; this is an admission that it is due to the *intestate*, and the Court will order it to be paid over to the *administrator*.

SIR JOHN SMITH, being tenant for life, made a lease for years, rendering rent, payable on such a day, and afterwards died about two of the clock in the afternoon of that day on which the rent was payable. The tenants having paid the rent to *Lady Wentworth*, who was the next in remainder, the plaintiff took out administration to the intestate *Sir John Smith*, and then exhibited his bill in this court to oblige the defendant, who had wrongfully received the rent, to pay it over to him, alledging, that the rent was due to the intestate in his life-time.

IT WAS INSISTED *for the defendant*, that the rent was not rightfully due to the intestate until twelve of the clock of that night, though it is demandable before sunset, for the benefit of the tenants, to save a condition, &c. for it is not legally due to the landlord until the last minute of that day on which it is payable; and the tenants having paid it to the defendant, who had a right to the remainder, in whose time it incurred and became due, the plaintiff cannot recover it from her, unless he shew that it vested in the intestate. To prove this point, the case of *Lord Rockingham* (*a*) was cited, where the lessor died on *Michaelmas-Day* in

S.C. Prec. Chan. 555. 1. Peer. Wms. 180. 392.

(*a*) Lord Rockingham v. Oxendon, 2. Salk. 578. Will. Rep. 177. pl. 43.

 the

THE EARL OF STRAFFORD *againſt* LADY WENTWORTH.

the afternoon, and before the ſetting of the ſun, and it was inſiſted for the *executor, that the rent being reſerved payable on that day, it might have been paid in the morning, and that a releaſe upon ſuch payment had been a good diſcharge, but it was decreed in that caſe, that the rent ſhould go to the heir, becauſe at the time of the death of the leſſor he had no remedy to compel the payment, and by conſequence it was not veſted in him until the laſt minute of that day.

THE COURT. The ſingle queſtion is, Whether this rent was due to the inteſtate or not? for if it was, then the plaintiff, who is his adminiſtrator, ought to have it. It is true, that it was not due from the tenants until the laſt minute of the day on which it is payable, neither could they be compelled to pay it until after that day; but they having paid the rent, they admitted it was due from them, and it is plain the defendant had no right to receive it; therefore it being paid into a wrong hand, who received it without any title, it ought to be paid over to the plaintiff, who had a colourable title to receive it as adminiſtrator of the inteſtate (*a*).

(*a*) By 11. *Geo.* 2. c 19. ſ. 15. "Where any tenant for life ſhall happen "to die before or on the day on which "any rent was reſerved or made payable "upon any demiſe or leaſe of any lands, "tenements, or hereditaments, which "determined on the death of ſuch tenant "for life, the executors or adminiſtra- "tors of ſuch tenant for life ſhall recover, "in an action on the caſe, of and from "ſuch undertenant or undertenants of "ſuch lands, tenements, or hereditaments, if ſuch tenant for life die on "the day on which the ſame was made "payable, the whole, or if before ſuch "day, then a proportion of ſuch rent, "according to the time ſuch tenant for "life lived of the laſt year, or quarter of "a year, or other time in which the ſaid "rent was growing due as aforeſaid, "&c."

TRINITY

TRINITY TERM,

The Ninth of George the Firſt,

IN

The Year

1722,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Deſcarlett *againſt* Dennett. Caſe 11.

DENNETT made a leaſe to *Deſcarlett* the complainant for certain lands at *Walthamſtow*, in *Eſſex*, for nine years, rendering three pounds ten ſhillings a-year, with a clauſe of re-entry for non-payment of the rent or non-performance of covenants; in which indenture was a particular covenant, that the plaintiff ſhould not ſuffer perſons to make uſe of a way over part of the lands demiſed; notwithſtanding which covenant, the plaintiff put up a gate at the entrance into the cloſe, and permitted any perſon to paſs over the way, requiring them to pay. For breach of which covenant, and for non-payment of the rent, the leſſor brought an ejectment, and had judgment. He alſo brought ſeveral other actions, which ſeemed to carry an appearance of vexation.

Bill in chancery will not lie to be relieved againſt a wilful voluntary breach of covenant or condition. Poſt. 91. 113.

To be relieved againſt which judgment in ejectment, the leſſee brought his bill in this court, offering to pay the rent, and ſatisfy the leſſor for the damages in breaking the covenant.

But the bill was diſmiſſed by SIR JOSEPH JEKYLL, *Maſter of the Rolls*; for the court of chancery cannot relieve the non-performance of a covenant or condition, the prejudice in breach of which cannot be eſtimated by damages. This tends to the prejudice of the inheritance, inaſmuch as it may hereafter amount to an

evidence

DESCARLETT *againſt* DENNETT.

See ſtat. 4. *Geo.* 2. p. 28.

evidence for a preſcription over the cloſe. The caſe of an entry for non-payment of rent is very different; for there the loſs is certain, and may be recompenſed by damages. This has been a ſettled rule in equity.

Wherefore the bill was diſmiſſed.

MR. LUTWYCHE, *for the plaintiff*, argued, that it is hard for his client to loſe his leaſe, when he is willing to make recompence.

But by THE MASTER OF THE ROLLS, It is owing to his own covenant, and to a wilful voluntary breach thereof, againſt which this Court cannot relieve (*a*).

(*a*) That the court of chancery will not relieve againſt a covenant where, on the performance or non-performance of the act to be done or omitted, the party is to pay a ſum by way of *liquidated damages*, ſee Small *v.* Fitzwilliam, Prec. Ch. 102. Woodward *v.* Giles, 2. Vern. 119. Eaſt India Company *v.* Blake, Finch, 117. Ponſonby *v.* Adams, 6. Bro. P. C. 417. Rolfe *v.* Paterſon, 6. Brown P. C. 470. Lowe *v.* Peters, 4. Burr. 2228. Legard *v.* Hodges, 3. Brown C. C. 534.; and that the Court will relieve where the penalty is intended merely to ſecure the enjoyment of a collateral object, ſee Slowman *v.* Walker, 1. Brown C. C. 418. Hobſon *v.* Trevor, 2. Peer. Wms. 191. Parker *v.* Wilſon, 10. Mod. 517. Chilliner *v.* Chilliner, 2. Vezey, 528.

* [23]

Caſe 12. * The Ducheſs of Marlborough *againſt* Sir John Vanburgh and Others.

Where, after an account ſtated, the parties were decreed to account again before a maſter.

S. C. 2. Eq. Ab. 11.
2. Chan. Caſes, 32.
1. Vezey, 163.
1. Vern. 179. 465.
2. Com. Dig. "Chancery" (2. A. 8.).

AFTER the battle of *Blenheim*, the parliament was ſo well ſatisfied with the conduct of the *Duke of Marlborough* in obtaining a victory there, that a vote paſſed the lower houſe, that ſomething might be done by the public for *the Duke*, to perpetuate the memory of that ſervice; and at length it was reſolved, that BLENHEIM-HOUSE ſhould be built for him at the expence of the public; and, purſuant to that reſolution, THE QUEEN by her officers agreed with workmen to build that houſe. But after laying out two hundred thouſand pounds in building it, *the Duke* fell into ſome diſgrace, and was charged to give an account what money he had received of the crown, and how he diſburſed it, and the building was no longer carried on at the public expence, but at the expence of *the Duke*; and at that time there was forty-five thouſand pounds due to the overſeers of this building and their workmen; and they who ſettled the accounts (*a*) with them had but ſixteen thouſand pounds of the public money in their hands, to ſatisfy that debt which they had paid; ſo that there was twenty-nine thouſand pounds due to them, as the account then ſtood, for which they exhibited a bill in THE EXCHEQUER againſt *the Duke*, and had a decree in their favour.

(*a*) Mr. Craggs, Mr. Sloper, Mr. Lownds.

And

THE DUCHESS OF MARLBOROUGH *againſt* SIR JOHN VANBURGH AND OTHERS.

And now upon an appeal in THE HOUSE OF PEERS *it was inſiſted*, that the decree ought to be repealed, for that *the Duke* * was not obliged to pay this debt, being a ſtranger to the vote of the houſe of commons for building this houſe, and being then out of the kingdom, and never intended to lay out above forty thouſand pounds in building a houſe for himſelf, which he had already laid out in carrying on and finiſhing the building thus begun by the public. Beſides, it did not appear that there was any manner of contract made by him, or by any other perſon by his order or authority, with the workmen, &c. to carry on this work; therefore they ought to take their remedy where by law they could. It was farther ſaid, that now the houſe was built it was of no real benefit to the appellant, becauſe it was ſo very large, that the furniſhing and keeping it in repair would rather be an incumbrance than a profit to any ſubject; ſo that there could be no colour to enforce the appellant to pay this debt.

IT WAS INSISTED *for the reſpondents*, that they were workmen and tradeſmen, and that they built this houſe in expectation of being paid for their goods and labour; and having no means to compel the payment any otherwiſe than by applying to *the Duke*, though all their contracts were made with public miniſters, it would be a very great hardſhip if they ſhould be unpaid, and ſuch a hardſhip as the circumſtances of ſome of them and their families could not bear; and therefore it would be more reaſonable, that the appellant (who enjoyed this houſe and had the inheritance thereof) ſhould pay for it, though there was no ſpecial contract to charge him, than that the reſpondents ſhould be without any manner of remedy for their money.

And it being made appear, that the appellant very often approved the building, and gave particular inſtructions to ſome of the reſpondents concerning the ſame, they had the ſaid decree affirmed in the houſe of peers, and that *the Duke* ſhould pay this debt.

Afterwards THE ATTORNEY-GENERAL moved the Court, that *the Duke* might be at liberty to file this preſent bill againſt the defendants, for that the account ſettled by *Mr. Craggs*, *Mr. Sloper*, and *Mr. Lownds*, who were employed by the public, ought not to conclude him; the rather, that ſince they had no power from *the Duke*, there was no reaſon their account ſhould bind him; and for that ſince he had carried on the work on his own account, it was done at a much cheaper rate in every article than when the public was to pay for it; and now, ſince the houſe of peers had decreed he ſhould pay the workmen, it was reaſonable he ſhould have a fair * account from them, and vouchers ſhould be produced to the * [25]
ſame, eſpecially ſince it does not appear, that THE HOUSE OF LORDS, who affirmed the decree, ever intended that he ſhould be concluded by the ſtated account.

And though this motion was ſtrongly oppoſed, yet it ſeemed reaſonable to THE COURT to grant it.

And

THE DUCHESS OF MARLBOROUGH *againſt* SIR JOHN VANBURGH AND OTHERS.

And thereupon the now plaintiff filed the ſaid bill, the ſcope of which was, that the plaintiff might have an account of what money the defendants had received for their work in building *Blenheim Houſe*, and to know what is fairly and juſtly due to them reſpectively, in order that the ſame may be paid.

One of the defendants, who was an overſeer of this building, by his anſwer, ſays, that he is not to account with any but the crown; and having already accounted, he inſiſts, that he ought not again to be called to account for the ſame thing; and all the defendants ſay, that they took *the Duke* to be their paymaſter, &c.

At the hearing the cauſe it appeared, that in the warrant to the overſeers of this building to proceed in the work, it was expreſsly mentioned, that they ſhould be accountable to none but to the *Duke of Marlborough*.

Therefore IT WAS INSISTED *for the plaintiff*, who is executrix of *the Duke*, that ſhe ſhould have their account. It is true, there is a great demand made by *Sir John Vanburgh*, but there is no reaſon that the plaintiff ſhould be ſaddled with it, becauſe he was an officer for the crown, from whom he had a penſion to overſee this work; but if the Court ſhould be of another opinion, then it muſt be conſidered how much he muſt be paid, for he inſiſts on ſix hundred pounds a-year for himſelf, and three hundred pounds a-year for his aſſiſtant, which is very extravagant, becauſe *Sir Chriſtopher Wren*, who was generally eſteemed the moſt experienced architect in *England*, had but two hundred pounds a-year for overſeeing the building of *St. Paul's Church*; and though theſe officers and workmen ſay for one another, that the bills delivered and allowed in the ſtated account are reaſonable, yet there is a convincing proof of the falſity of that aſſertion, *viz.* that ſince *the Duke* carried on this work at his own charge, it was done at twenty *per cent.* cheaper, in every article, than it was carried on before. Beſides, it will appear in proof, that the crown paid for ſeveral things which were never done, and that there were ſeveral frauds committed by the overſeers and workmen: as for inſtance, there were ſix hundred half-bricks delivered in, * and reckoned at eight hundred whole bricks; and that when theſe officers wanted fruit, they ordered the grocer to ſend it, and then charged it as candles burnt in carrying on the building; therefore, though there is an account ſettled with THE CROWN, it is unreaſonable it ſhould conclude *the Duke*, who is a ſtranger to it, and is now become chargeable in his own right.

*[26]

They who oppoſed the plaintiff ſaid, that as to the officers, and particularly as to *Sir John Vanburgh*, that by virtue of the decree made in THE HOUSE OF LORDS, the workmen who were employed by him ought to be paid by *the Duke* from the nature of the warrant; and certainly the ſame reaſon will oblige him to pay *Sir John*, who employed them, unleſs ſome cauſe can be ſhewed why the warrant ſhould be effectual to the workmen, and not to the officers

by

by whom they were employed. It is true, *Sir John* was an officer of the crown, and as ſuch he received a conſtant ſalary, but that will not oblige him to ſerve every private man on that account, but rather to have a greater reward when he is employed by a ſubject; becauſe, to be employed by THE CROWN is ſuch an approbation of his merit, that he muſt be eſteemed in a ſuperior degree than others of the ſame profeſſion. It is true likewiſe, that *Sir Chriſtopher Wren* was a very great architect, and had no more than two hundred pounds a-year for overſeeing the building of the cathedral of *St. Paul's*; but he lived in *London*, and had ſeveral other works carrying on there at the ſame time, whereas *Sir John Vanburgh* was expoſed to the fatigues of long journies to *Woodſtock*, and at the expence to have conſtant lodgings there.

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And as to the workmen, moſt of the arguments of their Counſel turned upon the hardſhip it would be for them to come to a new account before a maſter in chancery, for ſo great a ſum as it has coſt for the building this houſe, and to produce vouchers for every particular after ſuch a length of time. Beſides, ſeveral of the preſent defendants were the widows, children, and other repreſentatives of the deceaſed workmen; ſo that it would be almoſt impoſſible for them to produce vouchers for the work done by thoſe whom they repreſent, after ſo long an acquieſcence under the ſtated account, upon which they might ſo much rely as to make them remiſs and * negligent of ſuch vouchers, that probably great part of them might be loſt.

* [27]

But THE COURT, after enumerating ſome of the great actions of the late *Duke of Marlborough*, who carried every-thing he undertook by the ſtrength of his great conduct and courage, DECREED, that the officers and workmen ſhould come to an account before a maſter, and that the ſtated account ſhould not ſtand in the way.

Hutchinſon and Another *againſt* Vincent. Caſe 13.

THE PLAINTIFF had a brother who, as it was ſuggeſted in the bill, died ſeiſed of a real eſtate, and poſſeſſed of a perſonal eſtate of great value, and by his laſt will and teſtament deviſed ſeveral legacies to particular legatees, and made the defendant *Vincent* executor, and died, againſt whom the plaintiff and his ſiſter exhibited this bill to have the real eſtate, and their diſtributive ſhares of the perſonal eſtate, or of the reſiduary part thereof after debts and legacies paid.

Where an executor hath no *ſpecific legacy* deviſed to him, he ſhall have the *reſiduum* of the perſonal eſtate after debts and legacies paid.

S. C. 2. Eq. Ab. 441.
Ante, 9. 11.
2. Vern. 104. 361. 425.
1. Pr Wms. 554.
3. Pr. Wms. 193.
2. Com. Dig. "Chancery" (3. G. 7.).

The defendant by his anſwer ſets forth, that the teſtator, by his laſt will, deviſed a legacy of fifty pounds to his brother the now plaintiff, but left nothing to the other plaintiff his ſiſter; and that he made the defendant executor, but left no ſpecific legacy to him; ſo he inſiſts, that he as executor is entitled to the reſidue of the perſonal eſtate of which the teſtator died poſſeſſed, and denies that he

HUTCHINSON AND ANOTHER *againſt* VINCENT.

he was ſeiſed of any real eſtate, or, if he was, the defendant diſclaims all manner of right to it.

THOSE WHO ARGUED *for the plaintiff* inſiſted, that though the defendant is made ſole executor by this will, which after a long conteſt is now eſtabliſhed, yet, as this caſe is circumſtanced, the defendant ought not to have the whole perſonal eſtate, but ſhall be preſumed as a truſtee for the next of kin of the teſtator, unleſs it can be ſhewed that it was his intent his executor ſhould have the whole. Now by this will it ſtands indifferent, whether the teſtator intended the benefit ſhould be either for the defendant, who was his executor, or for his next of kin; but it is in proof, that he very often expreſſed a great regard for his brother and his children; therefore it cannot be preſumed he intended his eſtate for a ſtranger.

IT WAS ARGUED *for the defendant*, that nothing appears upon
*[28] the face of this will to induce the Court to intend the * defendant to be a truſtee for the next of kin; therefore the preſumption muſt be, that he intended the eſtate for the defendant; and though there are few caſes in point, yet the reaſon which governs ſome other caſes of the like nature may likewiſe govern this; but there is no caſe to prove, that an executor is a truſtee barely by being appointed executor. And it may be ſome reaſon to induce the Court to decree in favour of the defendant, when it ſhall be conſidered what vaſt expence he has already ſuſtained in the conteſt of this will: for firſt, the plaintiff conteſted it in *Doctors-Commons*; and after ſentence there for the will he appealed to the delegates, where that ſentence was affirmed; then he indicted ſeveral of the witneſſes for perjury, who proved the will, and they were all acquitted, there being no colourable proof againſt them; ſo that having been defeated at law, and in the ſpiritual court, he now makes his laſt attempt in chancery.

THE COURT. An executor has certainly the whole and entire right to the teſtator's perſonal eſtate both in law and in equity, unleſs upon the face of the will it appear, by ſome indications, that the teſtator intended to the contrary, as by giving him a ſpecific legacy; for by ſuch a deviſe it appears, that he intended him no more. And this was laid down as a rule when JEFFERIES was Chancellor, and with good reaſon, and has been a ſtanding rule in the court ever ſince (with ſome little variations and exceptions from the circumſtances of caſes) to exclude the executors. But the executor in the preſent caſe having no ſpecific legacy deviſed to him, it does not appear but that the teſtator intended the whole perſonal eſtate to him (*a*).

Foſter v. Munt, 1. Vern. 473. Ante, 11.

Therefore this bill was diſmiſſed, but without coſts, upon condition the plaintiff ſhall not trouble the defendant with any farther demands.

(*a*) See Raſhfield v. Careleſſe, ante, 10. Heron v. Newton, ante, 11.; note (1) to Mr. Cox's Peer. Will. 5th edit. p. 550. where the caſes on this ſubject are collected; and the caſe of Clennel v. Lewthwaite, 2. Vezey, jun. 465.

Spencer

Spencer *againſt* Chaſe.

Caſe 14.

THIS was a bill exhibited by the plaintiff againſt the defendant, to have an account of what was really due to him, and to have a reconveyance of the eſtate upon payment of the money, &c.

If *A.* buy from *B.* a minor, under circumſtances of diſtreſs, the reverſion of a houſe worth forty pounds a-year for a hundred pounds, and ſell it again in a few days for two hundred pounds, equity will compel *A.* to account with *B.* for the difference.

The bill ſets forth, that the defendant had impoſed on the plaintiff when under age, and had got ſeveral bargains made between them, which he compelled the plaintiff to execute * ſince he came of age, and particularly a mortgage of a houſe in *Ruſſel-Street*, in *Bloomſbury*, which the defendant now claims as an abſolute ſale; and that he perſuaded the plaintiff to mortgage other lands to him, the defendant, to ſecure the repayment of ſix hundred and forty pounds, when, in truth, he, the plaintiff, never received above three hundred and twenty pounds of him upon any account whatſoever.

The defendant by his anſwer denies any truſt of the houſe in *Ruſſel-Street*, but inſiſts, that it was an abſolute ſale thereof to him; and as to the mortgage-money, he could not remember the ſeveral ſums he had paid to the plaintiff, but affirmed that he had paid ſeveral ſums to him, and diſcharged ſeveral of his notes to other perſons, but cannot tell when, or to whom ſuch notes were payable, or who were witneſſes to them, having cancelled them at the time he took this mortgage for his ſecurity; but that he had actually paid to the plaintiff one hundred and one pounds ten ſhillings, and ſixty pounds more, and delivered a chaiſe to him, in all to the value of two hundred pounds and upwards, but denies any impoſition on the plaintiff; and inſiſts, that he may be allowed two hundred and ten pounds the plaintiff had of him, over and above the ſix hundred and forty pounds ſecured by the mortgage, beſides his charges and bills of fees and expences, as an attorney for the plaintiff, which were not yet made up, but inſiſts that they ſhould be allowed on the account.

IT WAS ARGUED *for the plaintiff*, that from the nature of this tranſaction he had a very hard caſe; for it appeared in the cauſe, that he was an attorney's clerk, and being very extravagant, was encouraged, ſupported, and ſupplied by the defendant in that way of living, he being another attorney in the neighbourhood, and who knew the plaintiff was entitled to the ſaid houſe and lands whilſt under age; and having been ſupported in his extravagancies with ſeveral ſmall ſums of money at ſeveral times by the defendant, he threatened this young man, as ſoon as he came of age, to ſend him to gaol if he did not repay the money; and thereupon he extorted from him both this conveyance of the houſe in *Ruſſel-Street*, and the mortgage of his other land (*a*). Now this houſe is very well

(*a*) See Stapleton *v.* Stapleton, 1. Atk. 10. Crow *v.* Ballard, 3. Brown C. C. 12a. Delorain *v.* Brown, 3. Brown C. C. 633. Fox *v.* Macreth, 2. Brown C. C. 400. Dungey *v.* Angove, 2. Vezey, jun. 304.

tenanted,

BOWER *against* CHASE.

tenanted, being a good houſe, and let for forty pounds *per annum*; and the plaintiff, who was entitled to the reverſion after the death of an old life then in being, ſold it to the defendant for a hundred pounds, who within a few days afterwards ſold it to one *Huckſley* for two hundred pounds.

* [30] * And as to the *mortgage-money*, even the defendant cannot ſhew any particulars of money paid by him, more than the plaintiff has ſet forth in his bill; ſo that he muſt come to an account for that money, and ought likewiſe to account for the profits of the houſe in *Ruſſel-Street*, notwithſtanding the pretended conveyance thereof was made by him after he came of age, becauſe it was extorted from him in the manner as already mentioned.

But as to that matter,

IT WAS ANSWERED *by the defendant's Counſel*, that there was no colour to make him account for the profits of the houſe in *Ruſſel-Street*; for though *Huckſley* gave him two hundred pounds for it in a little time after he, the defendant, bought it of the plaintiff, yet that was a great deal more than the real value, it being bought for the conveniency of the purchaſer, whoſe houſe was contiguous, and that there was no colour to avoid the ſale thereof, becauſe there was no manner of proof that the plaintiff was impoſed on or circumvented.

And as to the *mortgage-money*, there being a croſs-bill exhibited againſt the plaintiff, he owns in his anſwer, that he had received ſeveral conſiderable ſums of the defendant; therefore if he, the defendant, ſhall be made ſubject to account, and it being very hard to prove every particular diſburſement made by him in behalf and for the uſe of the plaintiff, it may be reaſonable that he ſhould be examined upon interrogatories, and that the defendant's bill of coſts, and all other his demands, may be brought into the account and allowed.

If a father deviſe lands to truſtees and their heirs until his ſon attain the age of twenty-five, a mortgage made by the ſon when only twenty-one is void.

But upon reading the will of the plaintiff's father, which was his title to the mortgaged lands, it appeared to be a deviſe of the ſaid lands to truſtees and their heirs, until the plaintiff came of the age of twenty-five years, and then in truſt for him and the heirs of his body, remainder to the right heirs of the father.

And it appearing that the plaintiff was not of the age of twenty-five years when he executed this mortgage, but of the age of twenty-one years, and no more, ſo that expreſsly by his father's will he was not to take until four years after the mortgage was made,

THE COURT was of opinion, that it was void in law; for if it was a contingent and executory deviſe to the plaintiff, it is plain he had no title until the contingency ſhould happen; but if the eſtate-tail was executed in him, then he might make a title by ſuffering a common recovery; but let it be either way, he was

now

now of age, and ought to pay or ſecure what is juſtly due to the defendant.

SPENCER *againſt* CRAIG.

* But as to *the ſale* of the houſe in *Ruſſel-Street*, it was an impoſition on the plaintiff, for the defendant bought it for leſs than three years purchaſe; therefore he ought to make an allowance for what he ſold it more than he paid for it to the plaintiff (*a*).

* [31]

AND *the mortgage* was decreed to ſtand as a ſecurity for what ſhould appear to be juſtly due to the defendant, of which the maſter was to take an account, and that the plaintiff ſhould have his coſts to this time, to be deducted out of what ſhall appear to be due to the defendant; and that upon payment thereof the defendant ſhall reconvey.

But upon non payment the plaintiff ſhall ſuffer a common recovery for the defendant's ſecurity, and be foreclоſed according to his prayer in the croſs bill: and if the defendant is willing to be at the charge, the plaintiff ſhall ſuffer a recovery immediately, leſt the defendant ſhould die before what is due to him ſhall be paid.

(*a*) Herne *v.* Meeres, 1. Vern. 465. Cheſterfield *v.* Janſen, 2. Vezey, 125. S. C. 1. Atk. 301. James *v.* Morgan, 1. Lev. 111. Buxton *v.* Lifter, 3. Atk. 383. Willis *v.* Jernegan, 2. Atk. 251. Stanhope *v.* Cope, 2. Atk. 231. Baldwin *v.* Rochford, 1. Wilſ. 230. Barny *v.* Beale, 2. Ch. Caſes, 136. Twiſſelton *v.* Griffith, 1 Peer. Wms. 310. Clarkſon *v* Hanway, 2 Peer. Wms. 203. Oſmond *v.* Fitzroy, 3. Peer. Wms. 129. Aſtley *v.* Reynolds. 2. Stra. 915. Barker *v.* Vanſomer, 1. Brown C. C. 149. Heathcote *v.* Paignon, 2 Brown C. C. 167.

Bertie *againſt* Lord Cheſterfield.

Caſe 15.

At the Rolls.

THE PLAINTIFF, *Mr. Bertie*, was deſired (as ſuggeſted in the bill, but not proved) by the late *Earl of Caernarvon* to ſee his lady buried; and thereupon the plaintiff employed an undertaker of funerals to bury the ſaid lady, expecting to be repaid what he ſhould lay out in the funeral expences by the defendant the *Earl of Cheſterfield*, to whom the *Earl of Caernarvon* had deviſed ſix thouſand pounds a-year, ſubject to the payment of his debts; but he refuſing to pay the ſaid charges, the undertaker brought an action at law againſt the now plaintiff, and recovered two hundred and ſeventy pounds for this burial.

The eſtate of a *huſband* in the poſſeſſion of his deviſee is liable to the funeral expences of the teſtator's *wife*, although ſhe lived apart from him on *a ſeparate maintenance.*

S. C. 2. Eq. Ab. 152. 483. Ch. Caſ. 84. 1. Vern. 143. 309. 326. 2. Com. Dig. "Chancery" (2. M. 7.).

Thereupon the plaintiff exhibited a bill in this court againſt the defendant, to diſcover aſſets in his hands of the *Earl of Caernarvon's* eſtate, and to ſubject the ſame to the payment of this money for the burial of his lady.

It appeared in this cauſe, that there was a ſettlement of *ſeparate maintenance* made for this lady, and that ſhe had power to diſpoſe it by will; and that accordingly ſhe made a will, and thereby deviſed ſeveral legacies to perſons therein mentioned, and conſtituted the now plaintiff executor thereof.

BERTIE *againſt* LORD CHESTERFIELD.

But IT WAS INSISTED *for him*, that ſettlements for *ſeparate maintenance* ſhall never extend to funeral charges; and though the lady had made a will, and the plaintiff * executor, yet it appeared ſhe had given away more than ſhe had to diſpoſe.

IT WAS SAID *for the defendant*, that ſince the plaintiff was made executor, and had of his own accord taken upon himſelf the burial of the teſtatrix, there could be no reaſon to charge the defendant, for there could be no equitable charge on my *Lord Caernarvon's* eſtate in the defendant's hand, unleſs the plaintiff was deſired to overſee and take care of this burial of his lady.

And although that did not appear to be the caſe, yet becauſe the plaintiff took nothing of her eſtate by being made executor, for ſhe gave away the whole in legacies, IT WAS DECREED, that the huſband's eſtate is ſubject by law to pay the funeral expences in burying the wife, therefore the plaintiff ſhall be reimburſed out of *Lord Caernarvon's* eſtate in the defendant's hands, together with his coſts at law, and in this court.

But his bill was diſmiſſed with coſts, as far as it related to the undertaker, who was made a party to this ſuit.

Caſe 16. Lawly *againſt* Lawly.

Lands were ſettled in marriage on truſtees, &c. that if the wife ſurvived, then ſhe ſhould receive the profits as they were then let; the huſband made leaſes, and advanced the rent. DECREED, that the heir at law ſhall have the advanced rent.

3 C. 2. Eq. Ab. 578.

SIR FRANCIS LAWLY had iſſue *Sir Thomas*, who had iſſue *Sir Thomas*, the now plaintiff. The ſaid *Sir Francis*, upon the marriage of his ſon *Thomas*, ſettled ſeveral lands on truſtees, &c. in truſt for the ſaid *Sir Francis*, during his life; remainder to his ſon *Sir Thomas* for life; remainder to the firſt and every other ſon and ſons of *Sir Thomas* in tail male, with a power to either of them, when in poſſeſſion, to make leaſes of any part of the ſaid lands for twenty-one years, or three lives; provided, that if *Lady Lawly* ſhould ſurvive *Sir Francis* and *Sir Thomas* her huſband, then in truſt to permit her to receive the rents and profits of theſe lands during her life, as the ſame were at that time let. *Sir Francis* died, and *Sir Thomas* entered and let thoſe lands at an advanced rent, and died. *Lady Lawly* his wife received the ſaid rent during her life, for ſeveral years, and made her will, and the defendant executor thereof, and died.

And now the plaintiff exhibited this bill as heir at law to *Sir Thomas* and *Sir Francis* his grandfather, to have an account of the executor of the *Lady Lawly* of the overplus of the rent received by her in her life-time, and what has been received by the ſaid executor ſince her death, and that it may * be paid to him, for that he is entitled to it as heir at law as aforeſaid.

* [33]

The defendant anſwers and ſays, that if *Lady Lawley* received more than ſhe ought, it was above fourteen years ſince; ſo pleads the *ſtatute of Limitations*; and if that ſhould not be allowed, then he ſays that he has not *aſſets* but what is ſufficient to anſwer debts of an higher nature affecting the ſame.

But

But THE DEFENDANT WAS DECREED to account, and that what ſhall appear to have been received by *Lady Lawley* more than ſhe ought to receive (being the improved rent) ſhall be paid to the plaintiff out of her aſſets; and what has been received by the executor ſince her death ſhall be paid out of his aſſets. LAWLY *againſt* LAWLY.

And as to the *ſtatute of Limitations*, the plea was diſallowed, becauſe the eſtate in law was in truſtees. Statute of Limitations no good plea, where the eſtate in law is in truſtees.—S. C. 2. Eq. Abr. 72. Bunb. 69.

And the defendant was ordered to pay coſts.

Carrick and Others *againſt* Errington. Caſe 17.

THIS was a bill exhibited by the plaintiffs, *Carrick* and two others, as heirs at law to *Edward Errington*; and it was to avoid and ſet aſide a conveyance obtained by the defendant by fraud, ſuggeſting, that the ſaid *Edward* was a weak man in his intellects, and that he conveyed the lands, &c. to truſtees and their heirs, in truſt for *Thomas Errington*, for life; remainder in truſt to his firſt and every other ſon in tail male; remainder to *William Errington* in like manner; and all this in conſideration only of two hundred pounds; for which reaſon it appeared to be a fraud and impoſition on the ſaid *Edward*. Where papiſts are not diſabled by the ſtatute 11. & 12. *Will.* 3. c. 4 to bring their bill in equity. S. C. Annally, 97. S. C. 2. Eq. Ab. 623, 624, 625. S. C. 3. Brown P. C. 412. S. C. 2. Peer. Wms. 361. S. C. Moſeley, 8.

The defendant pleaded, that two of the plaintiffs are *papiſts*, and conſequently diſabled to bring this bill by the ſtatute 11. & 12. *Will.* 3. c. 4. for that they cannot take by deſcent from their anceſtor; and as to the other plaintiff, there is nothing in the caſe but what may be tried at law, *viz.* what was the conſideration of this conveyance; and it is plain, that the defendant *Errington* was eighteen years of age, and upwards, when the aforeſaid ſtatute was made, conſequently not within the penalties; therefore it ought to be tried at law, whether the plaintiffs are capable to recover, or the defendant capable to take by this conveyance; for it is probable that it may appear, *Edward* had ſome other conſideration * to make this conveyance beſides the two hundred pounds therein mentioned. * [34]

But admitting the firſt limitation to *Thomas* is void, he being incapable to take becauſe he was *a papiſt*, yet the limitation over to *William* is good, and ſhall veſt immediately.

But that was DENIED BY THE COURT, for the contrary was ſettled in the *Ducheſs of Hamilton's Caſe* (*a*), *viz.* that though the firſt limitation is to *a papiſt*, who is diſabled by the ſtatute to take,

(*a*) 2. Eq. Abr. 624.

CARRICK AND OTHERS *againſt* ERRINGTON.

yet it is not ſuch a void limitation, ſo as the remainder ſhall immediately veſt, as if the firſt was dead without iſſue.

Beſides, this eſtate is more likely to continue in a proteſtant family by ſupporting this conveyance than by deſtroying it; for *Thomas Errington*, the papiſt, is an old man, and has no iſſue, but *William*, who is the next in remainder, is a proteſtant.

THE COUNSEL *for the plaintiff* argued, that it was proper for him to apply to this court, becauſe it was to diſcover a fraud, and forthat the legal eſtate was and is in truſtees; ſo he muſt come into a court of equity to ſet the deed aſide. And if it is ſet aſide, the plaintiffs muſt take as heirs at law to *Edward*; for though two of them are papiſts, yet they were above the age of *eighteen years* at the time this ſtatute was made, and conſequently not ſubject to the penalties therein mentioned. But admitting they were all papiſts, and incapable to take, yet certainly they are capable of coming into a court of equity to ſet aſide any conveyance fraudulently obtained from their anceſtor; and the rather, becauſe it may happen that the next of kin, who is a proteſtant, may not be willing to be at the expence of a ſuit in chancery for ſuch a precarious intereſt as to receive the profits of an eſtate until the heir at law becomes a proteſtant; ſo that a fraudulent deed ſhall carry the eſtate. Beſides, it was ſettled in the caſe of *Roper v. Radcliff* (*a*), that the heir at law, though a papiſt, is capable to take the inheritance, for it is in him, though the next proteſtant of kin has the pernancy of the profits until the other becomes *a proteſtant*; and the truſt limited to ſupport contingent remainders cannot be ſaid to be a truſt for *a papiſt*, nor ſhall the remainder-man in this caſe take immediately, ſuppoſing the limitation to *Thomas* to be void as to himſelf, becauſe he * was *a papiſt*; for if he ſhould take immediately, then this abſurdity would follow, *viz.* all the contingent remainders to the ſons of *Thomas* would be void; and it could never be the intent of the donor, that *William* the remainder-man, who gave no conſideration, ſhould immediately have the eſtate; for all the conſideration moved from *Thomas*, and the only conſideration mentioned in the deed is money, ſo no other ſhall be averred.

* [35]

There was no decree made, but a reference to A MASTER to enquire what was the conſideration of this deed, if any.

And as for what was offered, that two of the plaintiffs were *eighteen years old* at the time of making the ſtatute, and conſequently out of the penalty, THE COURT WAS OF OPINION, that they were out of the letter of the act, but within the intent and meaning of it; for the lawmakers could never intend to put infants of tender years in a worſe condition than thoſe who were of

(*a*) Poſt. 167. 181. 10. Mod. 23. 2. Eq. Abr. 508. 1. Brown P. C. 450.

age,

age (*a*). But be that as it will, the plaintiffs are proper to make application here as heirs at law to *Edward Errington* (*b*).

(*a*) See the caſe of Hill *v.* Filkin, poſt. 154. 2. Peer. Wms. 6. 10. Mod. 481. 536.

(*b*) The cauſe came on to be heard, on the maſter's report, before KING, *Lord Chancellor*, on the 17th of *June* 1726, who declared, that the deed of ſettlement ought to be taken to have been fraudulently obtained, according as was declared by an order made by LORD MACCLESFIELD on 16th *June* 1724, and did therefore DECREE, that the ſaid ſettlement ſhould be delivered up to the plaintiffs to be cancelled; and it was referred to the maſter to take an account of the profits of the eſtate in queſtion received by *Thomas Errington* ſince the death of *Edward Errington*, diſcounting thereout what was due to him for principal and intereſt on the three bonds, and the bonds to be delivered up; and the ſurplus of the profits was to be divided into four parts, and the coheirs of *Edward Errington* were each of them to have one fourth part; and the receiver of the eſtate was to account before the maſter, and pay the money into his hands in like manner, and deliver poſſeſſion of the eſtate to the ſaid coheirs, and the tenants were to attorn and pay their rents accordingly. But on the 12th *November* 1726, the cauſe was reheard, and both the above orders of 16th *June* 1724 and 17th *June* 1726 were reverſed, THE LORD CHANCELLOR declaring, that he ſaw no cauſe to ſet aſide the ſettlement made by *Edward Errington*, but that *Thomas Errington*, to whom a truſt for life was limited for his benefit, being a perſon profeſſing the popiſh religion, the truſt was void by the ſtatute 11. & 12. *Will.* 3. c. 4. and that during his life the plaintiffs and the defendant *Frances Errington*, the coheirs of *Edward Errington*, were intitled to the rents and profits of the eſtate from the death of *Edward Errington*; and therefore referred it to the maſter to take an account of the profits of the eſtate received by *Thomas Errington* ſince the death of *Edward*; and what the maſter ſhould certify to be remaining in his hands, after all juſt allowances, was to be paid by him to the coheirs of *Edward Errington*, VIZ. to each a fourth part thereof; and the receiver was alſo to account and pay the rents in his hands in like manner; and he was likewiſe to deliver poſſeſſion of the eſtate to the ſaid coheirs; and the tenants were to attorn and pay their rents to them. And on an appeal to the houſe of lords, the decree was affirmed.

Savage *againſt* Foſter.

Caſe 18.

Where a perſon knowing his own title, and not giving notice of it to a purchaſer, ſhall never ſet it up againſt the purchaſer.

MARGARET SMITH being ſeiſed of the lands in queſtion, upon her marriage with *Peter Flavill* ſettled the ſame upon truſtees and their heirs, to the uſe of the ſaid *Peter Flavill* for life, then upon *Margaret* his intended wife for life; remainder, after the death of the ſaid *Peter* and *Margaret*, to the heirs of the ſaid *Peter*, on the body of the ſaid *Margaret* to be begotten; remainder to the right heirs of the ſaid *Margaret* for ever. The ſaid *Peter* and *Margaret* had iſſue only one daughter, the now defendant, who was married to one *Foſter*.—*Peter Flavill* died, and then his widow married one *Brown*, by whom ſhe had iſſue one other daughter, and no more; which daughter being courted by one *Williams*, but he refuſing to marry her without ſuch a fortune, which *Margaret* her mother was not able to give without breaking through this ſettlement, conveyed the ſaid lands to the aforeſaid *Williams*, *&c.*; and the defendant *Mrs. Foſter*, and her huſband, who knew that the lands were ſettled on her in tail as aforeſaid, ſolicited her mother *Margaret Brown* to make a conveyance in favour of the ſaid *Williams*, and were aſſiſting in carrying on the

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marriage between him and her half-ſiſter *Brown*. * Whereupon the ſaid *Margaret* conveyed theſe lands, &c. to the uſe of herſelf for life, remainder to *Williams* and his heirs; then the marriage took effect; and afterwards *Williams* ſold theſe lands to the plaintiff *Savage*, who entered and built an houſe thereon.

And now *Mrs. Foſter*, who was the iſſue in tail by virtue of the ſaid ſettlement, and endeavouring to ſet it up againſt the title of the plaintiff, who was the purchaſer, he exhibited a bill againſt her to have his title eſtabliſhed againſt that ſettlement; for that ſhe having full notice of the purchaſe, and of her own title, ſhe gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though ſhe was a *feme covert*, but that ſhe ſhould be concluded by this fact as well as if ſhe was an infant.

IT WAS ARGUED for the defendant *Mrs. Foſter*, that two things are neceſſary to bind the right in caſes of this nature: the one is, that the party muſt know his own title to the lands; and the other is, that he muſt be inſtrumental in promoting the purchaſe thereof by the vendee, without giving him notice of ſuch title; for it would be of dangerous conſequence if the bare permiſſion of him to proceed in the purchaſe ſhould be a foundation to bind his right in this court on the foot of fraud. It is true, the defendant knew ſhe had a title under this ſettlement, but ſhe apprehended ſhe was not to take till after her mother's death; ſhe knew likewiſe that her ſiſter was about to marry with *Williams*, but did not know upon what terms; but if ſhe had known the terms of that marriage, ſhe was then *a feme covert*, and her huſband ought to have given the plaintiff notice of her title; therefore his negligence ſhall not prejudice her, who had done nothing to loſe her inheritance and the entire benefit of this ſettlement for ever.

ON THE OTHER SIDE it was firſt denied, that the two things before-mentioned by the plaintiff's Counſel are neceſſary to have relief in caſes of this nature; the one, that the party ſhould know his own title; and the other, that he ſhould be inſtrumental in carrying on the purchaſe by another, without giving him notice of ſuch title. It is true, he ought to know his own title, and that muſt neceſſarily be intended in this caſe, becauſe the defendant had the cuſtody of this deed of ſettlement; but it is not neceſſary that the perſon intereſted ſhould be active or inſtrumental in carrying
*[37] on the agreement in order to a purchaſe; for * if the party knew his own title, there can be no danger that his right ſhould be bound by the purchaſe, becauſe it was in his power to help himſelf, by giving the purchaſer notice of ſuch right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaſer notice of her right; and therefore it ſhall be bound for ever; and the rather, becauſe the defendant ſolicited her mother to make this conveyance in favour of *Williams*, upon the marriage of her ſiſter, and for that the plaintiff hath entered and built on the lands.

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THE COURT. Where there is a parol agreement made for a leaſe, and the leſſee, by virtue of ſuch agreement, enters and builds, this Court will eſtabliſh it on the foot of fraud in the leſſor, notwithſtanding the ſtatute of Frauds, &c.; becauſe contracts executed in part are not always within the ſtatute, though executory contracts are (*a*).

Now this bill is brought to be relieved againſt a fraud in the defendant, who would avoid the plaintiff's title by an elder ſettlement, though ſhe was privy to, and aſſiſting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaſer.

2. Com. Dig. "Chancery" (4. I. 3).

Now when anything in order to a purchaſe is publicly tranſacted, and a third perſon knowing thereof, and of his own right to the lands intended to be purchaſed, and doth not give the purchaſer notice of ſuch right, he ſhall never afterwards be admitted to ſet up ſuch right to avoid the purchaſe; for it was an apparent fraud in him not to give notice of his title to the intended purchaſer (*b*), and in ſuch caſe infancy or coverture ſhall be no excuſe; for though the law preſcribes formal conveyances and aſſurances for the ſales and contracts of infants and *feme coverts*, which every perſon who contracts with them is preſumed to know; and if they do not take ſuch conveyances as are neceſſary, they are to be blamed for their own careleſſneſs, when they act with their eyes open; yet when their right is ſecret, and not known to the purchaſer, but to themſelves, or to ſuch others who will not give the purchaſer notice of ſuch right, ſo that there is no laches in him, this Court will relieve againſt that right, if the perſon intereſted will not give the purchaſer notice of it, knowing he is about to make the purchaſe; neither is it neceſſary, that ſuch *infant* or *feme covert* ſhould be active in promoting the purchaſe, if it appears, that they were ſo privy to it that it could not be done without their knowledge.

2. Com. Dig. "Chancery" (4. W. 28.).

* THEREFORE IT WAS DECREED, that the defendant ſhould levy a fine to the plaintiff to extinguiſh her right to the lands in this ſettlement, and that the plaintiff ſhould have a perpetual injunction to quiet his poſſeſſion; and that if the defendant ſhall levy the fine quietly, and without delay, then the plaintiff ſhall have no coſts, otherwiſe he ſhall pay coſts. And the caſe of *Watts v. Creſſwell* (*c*) was now remembered, where tenant for life borrowed money, and his ſon, who was the next in remainder, and an

* [38]

(*a*) See Pyke *v.* Williams, 2. Vern. 455. Lockey *v.* Lockey, Prec. Chan. 519. Floyd *v.* Buckland, 2. Freem. 268. Gunter *v.* Halſey, Amb. 586. Earl of Aylesford's Caſe, 2. Stra. 783. Owen *v.* Davis, 1. Vezey, 82. Taylor *v.* Beech, 1. Vezey, 297. Potter *v.* Potter, 1. Vezey, 441. Lacon *v.* Mertins, 3. Atkins, 4. Whitebread *v.* Brockhurſt, 1. Bro. Ch. Rep. 404. Whitchurch *v.* Bevis, 2. Bro. Ch. Rep. 566. Reading *v.* Wilkes, 3. Bro. Ch. Rep. 400.

(*b*) See Mocatta *v.* Murgatroyd, 1. Peer. Wms. 393. Goodtitle *v.* Morgan, 1. Term Rep. 762. Towle *v.* Rand, 2. Brown's C. C. 650.

(*c*) 9. Viner Abr. 425.

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infant, was a witneſs to the deed of mortgage; this Court gave relief on the foot of fraud, becauſe the infant did not give the mortgagee notice of his title. So in the caſe of one *Clere* (*a*), who was an infant, and clerk to an attorney, and had a mortgage on his maſter's eſtate, and engroſſed a ſubſequent mortgage thereof to another, without giving notice that the eſtate was mortgaged before to him; and for that reaſon his mortgage was poſtponed on the foot of fraud (*b*).

NOTA, In the next ſeſſions of parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of coſts, and offered to levy a fine on that condition; but it was rejected for not coming in time.

(*a*) Clere *v.* Earl of Bedford, 13. Viner Abr 536.

(*b*) That an infant who is privy to or practiſes a fraud ſhall be bound in the ſame manner as if he had been adult, ſee Evroy *v.* Nicholas, 2. Eq. Abr. 489. Becket *v.* Cordley, 1. Brown's C. C. 353. Harvey *v.* Aſtley, 3. Atk. 607. ; but it ſeems, that this rule is confined to ſuch acts as are voidable only, Sanderſon *v.* Marr, 1. H. Bl. Rep. 75.

Caſe 19.

Dowſe *againſt* Rue.

The ſubſequent mortgagee prays to redeem the firſt mortgage upon payment of what was due; and pending that ſuit, the firſt mortgagee ſets up another mortgage prior to them all: DEGREED a trial at law, whether that mortgage was executed; and if it was, how much money was paid on it.

UPON AN APPEAL from a decree at THE ROLLS, the caſe was thus:

The defendant, *Mrs. Rue*, whilſt a *feme ſole* lent a hundred pounds to the mortgagor, who, for ſecuring the repayment thereof, made a mortgage of the lands to her, dated in *April* 1700.

Afterwards the defendant married *Mr. Rue*, who being a ſeafaring man, and having a penſion or half-pay from the Government, proceeded in a voyage to ſerve the *Czar of Muſcovy*, and left a letter of attorney with his wife to receive his pay as it ſhould become due.

Afterwards the mortgagor of theſe lands borrowed ſix hundred pounds more of one *Mary Sherlock*, and for ſecuring the repayment thereof with intereſt, he mortgaged the ſaid lands to her by deed, dated in *Auguſt* 1701, which was a year after the mortgage for the one hundred pounds to the defendant *Rue*, who aſſigned the ſaid mortgage of a hundred pounds to another in her huſband's abſence, pretending ſhe had a power ſo to do, and produced a letter of attorney (as ſhe pretended) under his hand for that purpoſe; * but as ſoon as he returned, he brought a bill in equity againſt *the aſſignee*, and had a decree for a reconveyance on payment of one hundred and fifty pounds, which was paid by the ſaid aſſignee to the wife, upon her aſſignment of the ſaid mortgage.

*[39]

8. C. 2. Eq. Ab. 613.
2. Peer. Wms. 491.
2. Vern. 29. 81. 151.
2. Vezey, 571.
2. Com. Dig. "Chancery" (4. W. 28.).

Then the plaintiff *Dowſe*, in right of his mother in-law, *Mary Sherlock*, who had the ſubſequent mortgage for ſix hundred pounds, exhibited this bill againſt the defendant *Rue*, and *the aſſignee*, to have a fair account, and to have an aſſignment of the prior mortgage of one hundred pounds upon payment of what ſhall appear to be

be due thereon (*a*); and the rather, becauſe the ſaid firſt mortgagee had all the deeds and title of thoſe lands which were left in her poſſeſſion by the mortgagor; ſo that the plaintiff, who was the ſubſequent mortgagee, might be eaſily deceived. Dowse against Rut.

But now pending this bill, the defendant ſet up another mortgage of thoſe lands to them for ſecuring the payment of two hundred pounds with intereſt, which mortgage was dated the twenty-eighth of *March* 1700, about three weeks before the mortgage in *April* for one hundred pounds; but it being denied by the plaintiff, there was a decree made at THE ROLLS, that it ſhould be tried at law, whether the deed dated the twenty-eighth of *March* 1700 was executed, from which decree the plaintiff now appeals, for that it was too ſhort; for if upon the trial it ſhould appear that ſuch deed was executed, yet the money therein mentioned might be paid in part or in the whole; therefore it ſhould be directed to be tried in like manner, whether that money, or how much thereof, was paid.

BUT IT WAS INSISTED *for the plaintiff*, that this mortgage of two hundred pounds ſhould be ſet aſide without a trial at law, becauſe it appeared that the mortgagor had a title to thoſe lands by leaſe for thirty-four years; and in the mortgage dated in *March*, he recites it to be for thirty-eight years, ſo that it is very unlikely he would mortgage it for four years longer than he had in it; and in *April* following he mortgaged it to the ſame perſon for thirty years, to commence immediately; and this was very extraordinary in the mortgagee to take a ſecond mortgage of the ſame lands for a ſhorter date and time than the firſt, when the money lent and ſecured by this ſecond deed might have been better ſecured by indorſing it on the mortgage dated in *March* before. Beſides, if a ſubſequent term of the ſame premiſes was taken in *April*, and to commence at the ſame time, that will be a ſurrender in point of law o this deed in *March* before.

* It was admitted at THE ROLLS, at the hearing this cauſe, that if the deed in *April* had been to ſecure a greater ſum of money than the deed in *March*, it might have been preſumed to have been made in ſatisfaction of the firſt ſum; but it may be as well preſumed, that the mortgagor paid a hundred pounds of the two hundred pounds, and gave the ſecond mortgage in *April*, for the ſecuring the payment of the other hundred pounds, and neglected to cancel that in *March*. * [40]

Beſides, the defendant was never in poſſeſſion by virtue of this mortgage dated in *March*, neither was the principal or any intereſt demanded in twenty years.

(*a*) See Wortley *v.* Birkhead, 2. Vern. 81. Belchier *v.* Renford, 2. Vezey, 571. Hawkins *v.* Taylor, 6 Brown P. C. 28. Robinſon *v.* Davidſon, 1. Brown C. C. 63. 2. Vern. 29. Turner *v.* Richmond,

BUT

Dower *againſt* Rolls.

BUT IT WAS INSISTED *for the defendant*, that no alteration ought to be made in the decree at THE ROLLS, but only, that it may be directed to try if any part; and how much of this two hundred pounds was paid?

AND THEREUPON IT WAS DECREED, that it ſhould be tried at law, whether this deed was executed; and if it was; then whether the whole, or any part, or how much of the money was paid.

Caſe 20.

Reynolds *againſt* The Lady Tenham.

Guardianſhip of an infant is not aſſignable to another.

S. C. 2. Eq. Abr. 486.

2. Eq. Caſ. 486. pl. 16.

THIS was A PETITION preferred to THE LORD CHANCELLOR by *Mr. Reynolds*, the grandfather of an infant of the age of ſeven years, to have him taken out of the cuſtody of his mother, the defendant, being A PAPIST, and to be delivered to *Serjeant Banes*, and another named by the petitioner, that he might be educated in the proteſtant religion.

It appeared by ſeveral affidavits ready to be produced, that this infant was entitled to ſeventeen hundred pounds a-year, as tenant in tail in remainder, after the determination of the eſtate for life of his ſaid grandfather.

IT WAS INSISTED *for the petitioner*, that it might be of very ill conſequence that the education of this child ſhould be left with a papiſt, who might inſtil the principles of that religion in an infant. That the father of this infant ſaid on his death-bed, that he expected his father, the petitioner, would take care to educate this child in the proteſtant religion, and not leave the education of it to his wife, who was a papiſt; but he being now dead, and the grandfather, the petitioner, very old, and for that reaſon unable to take the guardianſhip on him; he deſired that two of his friends in whom he repoſed an entire confidence, and to whom he aſſigned the guardianſhip, might have the education of this infant.

* [41]

* Thereupon THE COURT inquired, whether thoſe perſons were willing to take this charge upon themſelves; and one of them, VIZ. *Serjeant Banes*, being preſent, ſaid, that he had received ſeveral favours from *Mr. Reynolds*, the petitioner, and therefore was willing to ſerve him in anything with which he ſhould be entruſted; and that if the Court thought it proper, he would take this charge upon himſelf.

But the defendant, the *Lady Tenham*, did by her Counſel oppoſe the making any order upon this petition, for that it appeared by the oath of the *Earl of Litchfield*, then in court (who was the godfather of this infant), and by the oaths of ſeveral other perſons, that this lady had ſo great a regard to what her huſband in his lifetime deſired, as to the education of this child, that ſhe directed he ſhould be baptized by a miniſter of the church of *England*, and that

that he is conſtantly attended by ſuch a miniſter, ever ſince he hath been capable of any inſtruction, and particularly he hath been taught the church catechiſm. Beſides, the petitioner deſerves very little favour as to this matter, becauſe he having ſeventeen hundred pounds a-year as aforeſaid, was ſo hard to his own ſon (the father of this infant) that he allowed him no more than forty pounds a-year for his maintenance, and would never ſee him ſince his marriage with the defendant, and had never ſeen this infant, his grandchild, or deſired to ſee it; therefore it would be very hard to take a child from a mother, at the inſtance of a grandfather, who was ſo very unkind to his own ſon, and to commit it to the care of ſtrangers (for he doth not deſire the guardianſhip himſelf); and the rather, becauſe the mother is willing to give any ſecurity the Court ſhall approve, that this child ſhall be educated in the proteſtant religion, and that the *Earl of Litchfield* would be one of her ſecurities; or otherwiſe, that this child might be delivered to that noble lord, or at leaſt that he may be one of the guardians, and that ſhe may have the liberty of ſeeing her own child, and not be deprived of that comfort which all other mothers naturally enjoy.

THE COURT. This lady has been married to two proteſtants, and ſtill continues a Roman Catholic, and probably it is to her honour ſo to do, being convinced ſhe is in the right; but though her honour has got ſo far the better of her principles, as to educate this child a proteſtant, according to the deſire of her huſband, yet it is to be feared, that ſhe will always have ſuch perſons about her as may inſtil the principles of another * religion in his mind, and make a wrong impreſſion on his tender years. Beſides, if this was not to be feared, it might be more advantageous for the child to be under the care of ſome other perſons, and not of his mother, who by her indulgence and fondneſs might do it an injury. * [42]

THEREFORE IT WAS ORDERED, that the child ſhould be delivered to thoſe perſons whom the grandfather, the petitioner, had appointed to be guardians, but ſo as the mother may ſee him at any time.

But THIS DECREE WAS REVERSED in the houſe of lords, upon the appeal of the *Lady Tenham*, and there reſolved, that theſe words of her huſband on his death-bed, "that he expected his "father, the petitioner, would take care to ſee this child edu-"cated in the proteſtant religion," were a good appointment to make the grandfather guardian. That the appointment of a guardian is a bare power and truſt, and not aſſignable, as it has been reſolved in the caſe of *Bedle v. Conſtable (a)*; and about three years ſince in the *Duke of Beaufort's Caſe (b)*, whoſe father had appointed the *Duke of Ormond* guardian; but he being attainted of high treaſon, and ſo made uncapable, another guardian was ap-

(a) Vaugh. 177. (b) 2. Peer. Wms. 703.

pointed

REYNOLDS *againſt* THE LADY TENHAM.

pointed by act of parliament, it being not to be done by any other power.

THEREFORE the petitioner, the grandfather, was ordered to take the guardianſhip upon himſelf in perſon, for that he could not aſſign his power to another; and this is agreeable to another decree made in the houſe of lords, in the caſe of *Foſter v. Denyon (a)*.

(a) 2. Chan. Rep. 257. See alſo and Mr. Fonblanque's Equity, 2 vol. Roach v. Garvan, 1. Vezey, 160.; 235. Harg. Co. Lit. 88. *notis.*

*[43]

Caſe 21.

Steed *againſt* Cragh.

At the Rolls.

A long term of years was veſted in the huſband in right of his wife; he made an underleaſe for ten years; and upon borrowing money of the leſſee, covenanted to grant him another leaſe after the end of the ten years, and to continue during the time he had any right, but died before he made ſuch leaſe: DECREED that this was a good diſpoſition of the term in equity.

S. C. 2. Eq. Ab. 37.

THE DEFENDANT being a *feme ſole*, and poſſeſſed of a long term for years, afterwards married with *W. R.* who made an under-leaſe to *L. R.* for ten years; and in ſome ſhort time after, having occaſion for money, he borrowed it of the ſaid *L. R.* the under-leſſee, and covenanted that he would grant him another leaſe of the premiſes, to commence after the expiration of the ſaid term for ten years, and to continue during the time he had any right, &c. but died before he made ſuch leaſe. * *L. R.* the under-leſſee, aſſigned his term of ten years to *B. B.* and alſo all his right which he had by virtue of this covenant, and then *B. B.* by his laſt will deviſed the ſame to the plaintiff *Steed*, who entered, and was poſſeſſed, and the term for ten years being expired, the now defendant (who was plaintiff at law) brought an ejectment; and thereupon the plaintiff exhibited a bill to be continued in the poſſeſſion of the lands, by virtue of the ſaid covenant, and that the Court might declare he had a right under it, and grant an injunction to ſtay proceedings at law.

The defendant demurred to the bill, ſuggeſting, that if there was any ſuch covenant, it was only a bare agreement between the parties, and reſted in covenant, which could only charge the executors or adminiſtrators of the covenantor; and that ſhe claims neither as executor or adminiſtrator, but by virtue of that right which ſhe had paramount that of her huſband *(a)*; and therefore inſiſted that this bill might be diſmiſſed with coſts.

BUT THE COUNSEL *for the plaintiff* argued, that this covenant was a good diſpoſition of this term in equity, and that it was not prayed in the bill, that the defendant ſhould be obliged to carry this covenant into execution, but that the Court would declare it to be a good diſpoſition of the term in equity; and thereupon to grant an injunction againſt the defendant.

(a) 32 *Hen.* 8. c. 28. Co. Lit. 326. 261. 2. Com. Dig. "Baron and Feme" 352. 1. Roll. Abr. 343. 852. Hob. (E. 2.) (R.).

AND

AND ACCORDINGLY IT WAS DECREED at *the Rolls*, that this covenant was a good diſpoſition of the ſaid term in equity, becauſe the huſband had a power to diſpoſe it; and that the covenant was ſuch a lien as bound the right, in whoſe hands ſoever it went (*a*).

STEER *againſt* CRAGH.

(*a*) Grute *v.* Locroft, Cro. Eliz. 287. Harbin *v.* Barton, Moor, 395. Anonymous, Poph. 4. Norden *v.* Lovett, 1. Freem. 442. 1. Eq. Abr. 240. 2. Jones, 88. 2. Lev. 189. Oglander *v.* Baſton, 1. Vern. 396. 1. Eq. Abr. 69.

Anonymous.

Caſe 22.

A FEME SOLE being poſſeſſed of a term for years, married *W. R.* who was afterwards divorced *à menſâ et thoro*, and ſhe had *alimony* allowed to ſupport her.

The huſband poſſeſſed of a term in right of his wife, was divorced *à menſâ et thoro*, and an injunction was granted, he being about to ſell this term.

And now the huſband intending to ſell this term, her Counſel moved for an injunction.

Which THE COURT denied at firſt to grant (*a*), becauſe the ſeparation *à menſâ et thoro* did not deſtroy the marriage, for the parties were ſtill huſband and wife: now ſuppoſing the huſband had been entitled to this term in his own right before marriage, and afterwards had been divorced from his wife, and ſhe had alimony allowed, this Court would never * have granted an injunction to hinder him from ſelling; and certainly, whilſt the marriage continues, he has the ſame power to diſpoſe the term (*b*), which he has in right of his wife, as he had if it had been in his own right.

* [44]

But her Counſel ſtill preſſing for an injunction, ſo that the merits of the cauſe might come before the Court, and inſiſting very much on the hardſhip of the caſe, and that the wife could have no remedy if this term was ſold;

THE COURT granted an injunction; for though the marriage continues notwithſtanding the divorce, yet the huſband does nothing as huſband, nor the wife as wife.

(*a*) See Milner *v.* Colmer, 2. Peer. Wms. 641. Fitzer *v.* Fitzer, 2. Atk. 514. Dimmock *v.* Atkinſon, 3. Brown's C. C. 395.

(*b*) Co. Lit. 46. 351. Hob. 3. in marg. 1. Vent. 7. 18. 2. Caſes in Ch. 73. 2. Vern. 270. 3. Atk. 435. 3. Will. 277.

TRINITY

TRINITY VACATION,

The Ninth of George the First,

IN

The Year

1723,

BEFORE

The Barons of the Exchequer,

AT

Serjeants Inn Hall.

Sir James Montague, *Knt. Chief Baron.*

Robert Price, *Eſq.*
Sir Francis Page, *Knt.*
Sir Jeffrey Gilbert, *Knt.*
} *Barons.*

The Executors of Devallar *againſt* Herring. Caſe 23.

ONE *Smith*, who was proprietor of *an annuity ticket* in one of the public funds, ſold it to *White*, who ſold it to *Devallar*, a ſingle man, who made the plaintiffs his executors, and died.

TROVER will not lie againſt the *bona fide* holder of an *annuity ticket* which had been loſt by or ſtolen from a former proprietor, if ſuch ticket has been regularly transferred to ſuch holder purſuant to the ſtatute by which it was iſſued.

The plaintiffs coming to his houſe after his death, found one of his ſcrutores opened, which they ſuſpected to be done by one *Powell* his man-ſervant, by the contrivance of the ſervant-maid; they being the only perſons in the houſe, and are ſince intermarried.

Upon examining the books of account, the plaintiffs found an entry made of an *annuity ticket* bought of *White* on ſuch a day, which

THE EXECUTORS OF DEVALLAR *against* HERRING.

which was a little before his death; and that ticket being now loſt, the plaintiffs advertiſed it in the public papers, with a promiſe of a reward to any perſon who ſhould produce it, and to ſtop it before it paſſed the office. But this advertiſement being not made till about two months after the teſtator's death, the ticket was ſold before that time in *Exchange-Alley*, and paſſed through ſeveral hands until it came to the defendant *Herring*, who purchaſed it for a valuable conſideration, and had it transferred at the office to himſelf as from *Smith*, the firſt proprietor, whoſe name was endorſed; and a blank ſpace left over it to fill up the indorſement as uſual; all which was done before the advertiſement.

*[45] * The plaintiffs (the executors), knowing this ticket to be in the poſſeſſion of the defendant *Herring*, brought an action of *trover* againſt him.

At the trial they were nonſuited, becauſe the defendant having a transfer from *Smith*, the firſt proprietor, and counter-ſigned in the office, he had thereby a propriety, and no other perſon could have a legal right to it (*a*); for the ſtatute 11. & 12. *Ann.* c. 9. by which theſe annuity tickets were created, or the fund for the ſame, expreſsly provides, "that every transfer of theſe tickets ſhall "be filled up and counter-ſigned at the office, and an entry kept "of every aſſignment, or transfer, with the names of the parties "contracting for the ſame."

Evidence.

And it being a queſtion at this trial, Whether any evidence ought to be admitted of the right to this ticket, claimed by any perſon who had not complied with this ſtatute, againſt the right of him who had complied?

IT WAS RULED BY THE COURT, that it ought not; and thereupon the plaintiffs were nonſuited.

If a ſtatute on which *annuity tickets* are iſſued, direct "that "every tranſfer "of ſuch tic- "kets ſhall be "filled up and "counterſigned "at the *Bank*," a purchaſer of ſuch ticket, who neglects to comply with ſuch direction, cannot, on his loſing ſuch ticket, be relieved in EQUITY againſt a *bona fide* holder of it, who has complied with the directions of the act.

Afterwards the executors exhibited a bill in THE EXCHEQUER, in which they ſet forth the death of the teſtator, the entry of this ticket in his books, and all the aforeſaid matter, and that ſuch tickets are conſtantly ſold in EXCHANGE-ALLEY without indorſing any tranſfer, but only the name of the firſt proprietor; and that ſuch which have not tranſfers indorſed, ſell better than thoſe which have many ſuch indorſements; and that it is the common practice never to make any indorſement over the firſt proprietor's

(*a*) See the caſe of Power *v.* Wells, Cowp. 819. that in order to ſupport an action of trover, property in the plaintiff is eſſentially neceſſary; and therefore where the plaintiff exchanged a houſe with the defendant and gave poſſeſſion of it, it was held that TROVER would not lie to recover it back again, although the exchange was unfair; for by the exchange the property was gone out of the plaintiff. See alſo Colſton *v.* Woolſton, Bull N P. 35. Elkins *v.* Smith, Raym. 336. Whitehall *v.* Squire, 3. Mod. 276. Miller *v.* Race, 1 Burr. 452. Anonymous, 1. Salk. 426. Grant *v.* Vaughan, 3. Burr. 1516. Peacock *v.* Rhodes, Dougl. 613.

name

THE EXECUTORS OF DEVALLAR *againſt* HERRING.

name whilſt theſe tickets are in agitation, nor until they come into the hands of ſuch perſons who intend to keep them; for if every transfer ſhould be indorſed, the tickets would be ſo full of them, that they could be no longer transferable.

Therefore it was inſiſted, that the not indorſing the transfer, ſhould not, in equity, prejudice the plaintiffs, it being the conſtant method of aſſigning ſuch tickets, not to indorſe the transfer as aforeſaid.

The defendant by his Counſel inſiſted, that he purchaſed this ticket at a market-rate, and *bona fide* for a valuable conſideration in *Exchange-alley*, without any covin or fraud; and that he had complied with the ſtatute (*a*), and filled up an indorſement, which was proved by one *Mackoy* a broker, of whom he bought this ticket; and therefore it was inſiſted, that this bill might be diſmiſſed with coſts, as having no equity againſt the defendant, and for that the plaintiffs had already been defeated at law.

* [46]

* IT BEING OBJECTED againſt reading the depoſitions of *Mackoy*, for though he is a broker, and as ſuch might be a witneſs; yet it appears by his own depoſition, that in this caſe he did not act as a broker, but ſold the ticket in his own right; and becauſe the defendant may have ſome demand againſt him, if the plaintiffs ſhould prevail in this ſuit, therefore he ought not to be an evidence for the defendant, for that in conſequence might be to diſcharge himſelf.

If *A.* purchaſe an annuity ticket and loſe it, and *B.* being employed as a broker in *Exchange-alley*, ſells it to *C.* on a *bill in equity* being brought by *A.* againſt *C.* the depoſition of *D.* may be read in evidence.

But THE COURT was of opinion, that his depoſitions ſhould be read; for though his evidence might not be admitted before a jury of freeholders, for the reaſon before-mentioned; yet this Court are proper judges what ſtreſs or weight ought to be laid on it.

And after reading the anſwer, and *Mackoy*'s evidence confirming it in every thing,

THE CHIEF BARON and *Baron* GILBERT were of opinion, that the bill ought to be diſmiſſed; for that every purchaſer of ſuch tickets who keeps them open after the purchaſe, without filling them up with an indorſement and transfer according to the ſtatute, keeps them at his own riſque or peril; and if they come afterwards into the hands of a ſtranger *bona fide*, and for a valuable conſideration, who gets a transfer indorſed as directed by the ſtatute, he hath an abſolute right to them, both in law and in equity.

And *Baron* GILBERT held, that whatever the Court might do, if the cauſe was open, and came before them without a trial at law; yet there could be no equity now to ſet aſide the *nonſuit*,

(*a*) Cook *v.* Bamfield, 1. Chan. Caſes, 228. Blades *v.* Blades, 1. Eq. Caſes Abr. 358.

THE EXECUTORS OF DEVALLAR *againſt* HERRING.

becauſe that would be an admittance that the defendant had a legal right.

THE CHIEF BARON was likewiſe for diſmiſſing the bill. It is true, if the teſtator *Devallar*, when he purchaſed this ticket, had procured a transfer to himſelf, and thereby had a legal right to it; in ſuch caſe, if after his death the defendant had purchaſed it of a ſtranger, without acquainting his executors (the plaintiffs) therewith, they might have ſome equity on their ſide, becauſe the name of their teſtator was indorſed on the ticket, and by that means the defendant might have been ſure who was the owner of it, and who had the power to transfer it to him; yet as this caſe is, there could be no negligence in the purchaſer, for he bought it for a valuable conſideration, and had done every thing neceſſary to eſtabliſh his right, and could not know that the plaintiff's teſtator had any right to this ticket, becauſe there was no transfer indorſed
* [47] to * him; therefore by keeping it open without any transfer, he kept it at his own riſque for any man to fill up, who came to the poſſeſſion honeſtly, and without fraud; ſo that this bill ought to be diſmiſſed.

Baron PRICE differed in opinion, and argued from the hardſhip of the caſe; and that the defendant ſhould have taken care when he bought this ticket of whom he bought it, eſpecially ſince *Mackoy*, the ſeller, had no transfer to himſelf, but only the bare poſſeſſion; and ſince the name of *Smith*, the firſt proprietor, was indorſed, he might have been informed whoſe ticket it was he then bought. That it was a hard caſe on both ſides; it was hard for the plaintiffs (the executors) that they ſhould loſe their right, becauſe they did not know it ſoon enough to advertiſe it; and it is hard for the defendant to loſe the benefit of his purchaſe. He put the caſe of a *promiſſory note*, which, if indorſed and afterwards loſt, and paſſed in way of trade to a third perſon, for a valuable conſideration; yet the indorſee might bring an action of TROVER for the note againſt the third perſon; which THE OTHER BARONS did not deny (*a*).

Thereupon it was propoſed by *Baron* PRICE, that this ticket ſhould be divided between the contending parties, but that was not agreed to;

And at laſt THE COURT took time farther to conſider until next *Michaelmas Term*.

(*a*) But ſee Hinton's Caſe, 2. Show. 235. Miller v. Race, 1. Burr. 452. Grant v. Vaughan, 1 Black. Rep. 485. Peacock v. Rhodes, Dougl. 613.

TRINITY

TRINITY VACATION,

The Ninth of George the Firſt,

IN

The Year

1722,

BEFORE

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Vernon *againſt* Benſon. Caſe 24.

A SIGN MANUAL not counterſigned by the *lords of the treaſury*, nor by a *ſecretary of ſtate*, is not good.

THIS was a caſe referred to THE ATTORNEY and SOLICITOR GENERAL by the king and council for their advice, whether it was reaſonable for the king to revoke *a ſign manual* and *privy ſignet* granted to *Sir John Fryar*, in truſt for the defendant *Benſon*, the ſame being obtained by ſurpriſe (as was ſuggeſted in the plaintiff's petition) and without a full and due information.

The caſe was thus:

Colonel Vernon, father of the petitioner *Mary Vernon*, and great uncle of the other petitioner *Captain Vernon*, was a true royaliſt in the civil wars, and ſold his eſtate to raiſe a regiment for the ſervice of the king, and afterwards ſerved him in his exile. After the king was reſtored, he granted to the ſaid *Colonel Vernon* certain lands in *Cloontarſe* in *Ireland*, now of the value of ſeven hundred pounds *per annum*; and likewiſe, in conſideration of his ſaid ſervices to the crown, and of his giving the king all * that land on which the fort of *Sheerneſs* then ſtood, and alſo of ſeven thouſand pounds in money, the king by letters patent granted to him, and to *Rupert Brown*, the honour, manor, and foreſt of *Weedwood* in fee. Before this grant made to *Colonel Vernon*, he was poſſeſſed of ſome of the offices in the ſaid foreſt for a long term of years

* [48]

VERNON against BENSON.

then to come, by virtue of a grant made thereof to the *Duke of Ormond* and *Earl of Cheſterfield*, in truſt for him, &c. But the grant of this foreſt, as aforeſaid, being apprehended by ſome perſons at court to be very exceſſive, there was ſome intention to revoke it; but it not being done in the life-time of that king, his brother and ſucceſſor, *James the Second*, having the like intention, a bill was exhibited againſt the ſaid *Colonel Vernon* and *Rupert Brown*; and upon a full hearing of the cauſe before JEFFERIES, *Lord Chancellor*, aſſiſted by the TWO CHIEF JUSTICES and CHIEF BARON, it was decreed, that the ſaid letters patent ſhould be vacated, being obtained by a groſs impoſition on the king in the value of this foreſt, which are the very words of the decree. *Colonel Vernon* intending to appeal to the houſe of lords from this decree, ſoon afterwards died; and upon the acceſſion of *King William* to the crown, it was thought not expedient to reſt his right to this foreſt on this decree; therefore an act of parliament paſſed to veſt this foreſt, and all the rights and members thereof in the crown, nobody appearing in that ſeſſions of parliament to claim any right *the Colonel* had therein, or to the leaſes he had in the ſaid offices, or to the lands on which the *Fort of Sheerneſs* was built, the heirs and repreſentatives of the ſaid *Colonel* being all Roman Catholics. But *Rupert Brown* took care of himſelf, by obtaining in the ſaid ſtatute a ſaving of his right; and by a clauſe therein, *viz.* "That he ſhould be paid what debt was due to him from "*Colonel Vernon*, by ſale of ſome timber in the ſaid foreſt, to be "ſet out by ſuch perſons as the king ſhould appoint; and that he "ſhould aſſign over ſuch ſecurities as he had from *Colonel Vernon*, "to ſuch perſon or perſons as the king by his ſign manual or "privy ſeal ſhould at any time appoint to recover the ſame." And *Rupert Brown* being paid the debt due to him by the ſale of timber, this debt, which was originally due from *Colonel Vernon*, remained in the crown. * Thereupon the late queen granted A PRIVY SEAL to one of her officers to recover this debt for her uſe; and the petitioner *Mary Vernon* having in like manner petitioned her majeſty as now, and that petition being referred to the lords of her majeſty's council, they repreſented the petitioner to the queen as an object of her charity.

* [49]

But *the Queen* dying before anything more was done purſuant to the ſaid privy ſeal; this debt due from *Colonel Vernon* ſtill remained in the crown by virtue of the ſtatute aforeſaid; and thereupon the defendant *Benſon* obtained this ſign manual, to *Sir John Fryar*, to recover this debt in truſt for the ſaid *Benſon*; and likewiſe another ſign manual reciting the firſt, and commanding *Rupert Brown* to deliver to *Sir John Fryar* all the ſecurities he had from *Colonel Vernon*, and to aſſign them to *Sir John*, which was accordingly done by an aſſignment of a judgment of three thouſand five hundred pounds in *Ireland*, which affected his eſtate in *Cloontarſe*, which judgment was revived; and the petitioner *Mary Vernon* ſued to an outlawry there, and a *ſcire facias* was brought againſt *Captain*

Captain Vernon, the other petitioner, who was the next in remainder after an eſtate-tail in the petitioner *Mary*, by virtue of a ſettlement made by *Colonel Vernon* (the ſaid *Mary* being now above fifty years old, and without iſſue); thereupon this petition was exhibited, ſuggeſting the matter above mentioned, and that the king was ſurpriſed in the granting this ſign manual, and not duly informed of the merits and ſervices of *Colonel Vernon*, or of that equitable demand he might have of the crown, for the land on which the fort of *Sheerneſs* was built, or of thoſe terms for years ſtill ſubſiſting of, and in thoſe offices which he had in *Weedwood Foreſt*.

And this petition being referred to THE ATTORNEY and SOLICITOR GENERAL for their opinion, whether it was reaſonable for the king to revoke this ſign manual and privy ſignet to *Sir John Fryar*, as obtained by ſurpriſe, and without due information, as aforeſaid;

IT WAS ARGUED *in behalf of the petitioners*, that it was a great hardſhip that the heirs of *Colonel Vernon* ſhould be deprived of thoſe equitable demands they had on THE CROWN, for the lands on which the *Fort of Sheerneſs* was built, and of the right which they had to the leaſes for years in the offices in this foreſt, and to have no manner of ſatisfaction for the ſame, or for any part thereof; and that as it is very probable, if the king had been informed of theſe * demands at the time he granted this SIGN MANUAL, he would not have granted it, ſo it is reaſonable for him to revoke it, now he is fully appriſed of the ſaid demands (*a*). Beſides, this SIGN MANUAL never paſſed through the offices as it ought to have done, for there is no copy thereof in the office of the ſecretary of ſtate, or in the office of the lords of the treaſury, and therefore not duly iſſued; and it would be of dangerous conſequence, if the treaſure of the crown could be diſpoſed by a ſign manual, without being counterſigned by the lords of the treaſury, or ſome other officers, who are by the laws of the land to be a guard to the king, that he might not be impoſed on by any of his ſubjects.

* [50]

THE COUNSEL *for the defendant* inſiſted, that this ſign manual was obtained without any fraud, and without any impoſition on the crown, and that this debt was now veſted in the king by act of parliament, without any reſervation of the right of the petitioners; and if they ſuffer any hardſhips, it is not by the defendant, but by the ſtatute, who did not, nor could appriſe the king of any right they had, as not knowing they had any; and that if they have any equitable demands on the crown, ſtill they cannot have any right to this debt, becauſe it is veſted in the king by act of parliament, and therefore they may apply to him to be conſidered as his majeſty ſhall think fit. Now, admitting the ſign manual was not entered in the ſecretary's, or any other office, nor

(*a*) See 4. Inſt. 88. 2. Roll. Abr. 191. 3. Lev. 221.

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counterſigned by the lords of the treaſury, or by a ſecretary of ſtate; yet ſince it was fairly obtained, and ſince it was drawn by the under-ſecretary to the *Lord Sunderland*, who was principal ſecretary of ſtate, and by him ſent to SIR EDWARD NORTHEY, then *Attorney General*, for his opinion, and by him approved, and ſent back to the ſecretary's office, and all this done before it was ſigned by the king; in ſuch caſe, if the ſecretary hath been ſo remiſs as not to enter a copy of it, his neglect ſhall not be prejudicial to the defendant, who had done all which he ought to do to obtain this ſign manual. Beſides, the not counterſigning it doth not make it void, nor the not entering copies thereof in any of the ſaid offices doth not make it ineffectual, becauſe the counterſigning or keeping copies thereof ſerves to no other purpoſe than to appriſe the king, if any other perſon ſhould endeavour to obtain a ſign manual for the ſame thing which hath been already
* [51] * granted, or to ſerve as a tally to account with the king for his treaſure; it adds no force to the ſign manual; for in reſpect to the grantee, it is as good before it is counterſigned as afterwards; for if it ſhould be otherwiſe, then the ſecretaries of ſtate and the lords of the treaſury would have it in their power to render the king's grant ineffectual; therefore they are obliged to counterſign the ſame. Beſides, there is a very good reaſon why this ſign manual ſhould not be counterſigned, becauſe this demand never was any of the king's treaſure; for it is only a power or right to bring ſo much money into the treaſury; for which the lords of the treaſury are not accountable till it is actually brought in; for which reaſons it was inſiſted, that the king ought not to be adviſed to revoke this ſign manual, though it was not counterſigned, and though THE ATTORNEY GENERAL told the Counſel for the defendant, that he never ſaw any ſign manual before this but what was counterſigned.

THE COUNSEL *for the petitioners* replied, that it was abſolutely neceſſary all ſigns manual ſhould be counterſigned either by the lords of the treaſury, or by a ſecretary of ſtate; otherwiſe great inconveniencies might happen both to the king and people; for the king might be abuſed into extravagant, nay, into different grants of the ſame thing to ſeveral perſons; and it is for that reaſon the law appoints he ſhould be guarded by ſuch Counſel as would obſtruct ſuch grants; for if they ſhould be good without paſſing through the uſual offices, and without obſerving thoſe uſual ceremonies, it would be a vain thing to keep ſuch offices as a fence to the crown from any impoſitions. And though it has been ſaid on the other ſide, and it may be true, that the counterſigning adds no ſtrength to ſuch grants, and that they are good in reſpect to the grantee, though not counterſigned; and that it would be very inconvenient if the neglect of the king's officers ſhould be prejudicial to the defendant; yet the counterſigning is a neceſſary ceremony to be uſed in all the king's grants, to make them effectual in paſſing any intereſt to the grantee, and a condition without which

which they cannot paſs any treaſure out of the crown. Now if counterſigning is neceſſary, it would be a greater inconveniency to the public, if ſuch grants ſhould be good without being counterſigned, than that the neglect of the officer ſhould avoid a ſign manual for not counterſigning it, becauſe it is the buſineſs of the grantee to ſee that the officer ſhould do his duty in perfecting and finiſhing the grant; * but if ſuch naked grants (as this) ſhould be good to paſs the king's treaſure, then thoſe offices and officers are of no uſe. VERNON *againſt* BENSON. * [52]

On another day

THE COUNSEL *for the defendant* argued, that this was a good ſign manual, and effectual to paſs the king's right to this debt; for though it might not be good to paſs the king's treaſure, yet in this caſe it is no more than an appointment according to the ſtatute to recover a debt, and doth not reſt on the foot of other ſigns manual, but receives its ſtrength from an act of parliament, by which the right to it is veſted in the crown. This was granted by a ſign manual of the late queen, and then, as now, the ſaid *Mary Vernon* petitioned the queen to revoke it; and that petition was referred to the lords of the then council, who repreſented the petitioner as an object of her majeſty's compaſſion, which in effect was giving up her right, and ſhe may ſtill be an object of compaſſion, but that cannot be a reaſon to revoke a ſign manual fairly obtained; and to complain of any hardſhips, is to impeach the ſtatute, which ought not to be done, becauſe it is not to be imagined that the parliament would deprive any perſon of a juſt right without making ſome other recompence; and it may reaſonably be preſumed, that the petitioner had no right, for if ſhe had, that had been the proper time to claim it before the act paſſed. But the truth is, ſhe had no right; for the parliament conſidering how many years *Colonel Vernon* was in poſſeſſion of this foreſt, and had received the profits thereof, might apprehend that to be a good conſideration for his land on which the *Fort of Sheerneſs* was built, and of other demands he could have; and therefore there was no ſaving of any right in the ſtatute as to him. Now as to the counterſigning this ſign manual, admitting it to be neceſſary; yet if other things were done, which amount to a counterſigning, theſe ſhall make it as effectual as if it was counterſigned: now this ſign manual was ſealed with the privy ſignet, which is always kept in the ſecretary's office, and this is a good proof that it paſſed through the uſual offices, and was fairly obtained, and a better proof than if it had been counterſigned by the ſecretary himſelf. Beſides, about two years after the granting the firſt ſign manual, the defendant obtained another, commanding *Rupert Brown* to deliver up *Colonel Vernon*'s ſecurities to *Sir John Fryar*, which laſt ſign manual was counterſigned by the * ſecretary of ſtate; and a copy thereof is kept in his office, which plainly ſhews that it was not obtained by any ſurprize or miſinformation. * [53]

VERNON *againſt* BENSON.

THE COUNSEL *for the petitioners* argued, that though the firſt ſign manual was recited in the ſecond, yet that would not make the firſt good; for it was never yet heard that the recital of a void act in the king's grant ſhould make it better; but on the contrary, if the ſecond depends on the firſt, it avoids both, whether the grant is made by the king, or a ſubject. That this ſign manual, being ſealed by the privy ſeal, doth not amount to a counterſigning, as was alledged on the other ſide; for the true reaſon of counterſigning is not to ſhew that the grant paſſed through ſuch an office, but to ſhew what was done by the miniſter of ſtate, for or in behalf of the king, to whom he is accountable for his advice and conduct in the office. Now there being two ſecretaries of ſtate, and a privy ſignet kept in each of their offices, the ſealing the king's grants with the privy ſeal doth not inform the king, or the ſubject, which of thoſe ſecretaries paſſed the grant, as counterſigning doth; or if it did, it is not ſo effectual as counterſigning is, to bring a public miniſter to account for his miſconduct in paſſing ſuch grants which ought not to be paſſed, becauſe counterſigning is an approbation of the grant, and an implied conſent and advice of the miniſter to paſs it. As to what was ſaid, that this ſign manual doth not reſt on the foot of others, becauſe it is but an appointment according to the ſtatute to recover a debt; certainly this muſt be wrong; for though the ſtatute impowers the king to aſſign this demand, it muſt be intended by a good and effectual ſign manual, and not by one which is informal or void. And as to the repreſentation of the late queen's council of the petitioner to be an object of her compaſſion, which is now ſaid to be a giving up the right of the petitioners; it is very true, that ſince the ſtatute the petitioners have no remedial right; neither do they inſiſt in their petition, that they have any right, but ſet forth what ſervices *Colonel Vernon* had done for the crown, and what reaſons might induce his majeſty to extend his royal bounty to them who are his heirs; and that this debt being now veſted in the crown, they deſerve to have it releaſed more than any other perſon can deſerve to have it granted. * It is true, the repreſentation of theſe ſervices, and the hardſhips ſuffered, are foreign to the merits of the reference now depending, but requiſite to induce the king to grant this reference; therefore the petitioners did not now rely on thoſe ſervices, but would leave them to the conſideration of the king in council: and at this reference they rely, that this is a naked and informal ſign manual without any precedent, and not ſufficient to paſs the king's treaſure, and conſequently ought to be revoked, if it is his majeſty's pleaſure ſo to do.

* [54]

NOTA.

At this reference THE ATTORNEY GENERAL ſaid, that he never ſaw any ſign manual but what was counterſigned by the ſecretary of ſtate or the lords of the treaſury, but had ſeen ſeveral not ſealed with the ſignet or privy ſeal; that he had obſerved this difference, *viz.* that where the ſign manual was only a direction or commiſſion to do a farther act, as to make out letters patent, there it is only counterſigned, but not ſealed; but where it is

to

to be the principal act itſelf, there it is both ſealed and counterſigned.

Then one of THE COUNSEL *for the petitioners* ſaid, that *King William* had granted a ſign manual to the now defendant, who carried it to the ſecretary's office, when *Mr. Vernon* was ſecretary of ſtate, in order to have it counterſigned and ſealed, which he refuſed to do, and would not return the ſign manual, but kept it; and upon complaint made to the king, he was attended by that ſecretary, who ſhewed reaſons for his ſo doing, and the king was ſatisfied with the ſuppreſſing it.

After the death of that king, a bill was exhibited in chancery by the now defendant againſt ſecretary *Vernon*, ſuggeſting that he the complainant had obtained ſuch A SIGN MANUAL, which would have been very beneficial to him; but that it was unjuſtly ſuppreſſed by the defendant ſecretary *Vernon*; and upon hearing the cauſe, that Court approved what the ſecretary had done, and the plaintiff's bill was diſmiſſed.

THE REPORT of the Attorney and Solicitor General.—Upon conſideration of the ſeveral matters laid before us, we humbly certify your lordſhips, that although grants or warrants under the king's SIGN MANUAL ought regularly to be counterſigned by ſome officer of ſtate, according to the nature and import of ſuch grant or warrant; and that the omiſſion of ſuch counterſigning may be ſome evidence of ſurprize upon THE CROWN, when there is nothing to account for it: yet we apprehend that ſuſpicion is removed in the preſent caſe; the late *Earl of Sunderland* having by letter referred the conſideration of this very point to his majeſty's then attorney general, and the anſwer to that letter by *Sir Edward Northey*, in which he ſeems to intimate that there was no neceſſity that a warrant granted in purſuance of the proviſo in the ſtatute 7. & 8. *Will.* 3. *(a)* above mentioned, ſhould be counterſigned: which intimation of his, together with a doubt by what officer it ought to be counterſigned, might probably occaſion that omiſſion. If the want of being counterſigned makes the inſtrument void; or if THE CROWN had no authority to direct an aſſignment of the ſecurities, becauſe the three thouſand three hundred pounds and intereſt was diſcharged by a fall of wood, and not paid in money; we conceive the petitioners may take advantage of theſe points in the ordinary courſe of juſtice *(b)*.

As to what was inſiſted on for the petitioners, with regard to the circumſtances of their caſe; and that his majeſty would not have directed an aſſignment of the ſaid ſecurities to the perſon now claiming the benefit thereof, if thoſe facts had been laid before his majeſty; but if they were not, we do not think ourſelves at liberty to judge whether his majeſty would, or would not, have granted ſuch warrant in caſe they had been repreſented to him; ſince we are of opinion he might, by law, have granted it, notwithſtanding any of theſe matters inſiſted upon for the petitioners.

(a) See 7. & 8. *Will.* 3. c. 27. f. 15.

(b) See 4. Inſt. 79. 88. Dyer, 197. 3. Lev. 229.

TRINITY

TRINITY VACATION,

The Ninth of George the Firſt,

IN

The Year

1722,

BEFORE

The Delegates,

Sir Lyttleton Powys, *Knt.*
Tracy, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir James Montague, *Knt.*
Sir Francis Page, *Knt.* } *Barons.*

Sir Lawrence Anderton, Baronet, *againſt* Commiſſioners of the Forfeited Eſtates.

Caſe 25.

Whether a monk profeſſed is capable of taking an eſtate.

UPON AN APPEAL from the decree of the commiſſioners, &c. to the delegates, the caſe appeared to be thus:

Sir Lawrence Anderton being the eldeſt ſon of his father went to *Doway*, and there became A MONK; thereupon *Francis*, * the next brother of *Sir Lawrence*, aſſumed the title, and poſſeſſed himſelf of the eſtate of the family, but being concerned in a rebellion, and taken priſoner at *Preſton* in *Lancaſhire*, he was tried and found guilty of HIGH TREASON; and being pardoned as to his life, the commiſſioners ſeized the eſtate; and thereupon *Sir Lawrence* (the monk) claimed it, inſiſting before the commiſſioners, that his brother *Francis* had no right.

* [55]

THE

SIR LAWRENCE ANDERTON, BARONET, *againſt* COMMISSIONERS OF FORFEITED ESTATES.

THE COMMISSIONERS having examined *Sir Lawrence* upon oath, by virtue of a power given them by that ſtatute, which veſts the forfeited eſtates in the king; and upon his ſaid examination, he having confeſſed he was A MONK, they decreed for the crown, for that by the appellant's profeſſion he was dead in law, and by conſequence incapable to take; and therefore the eſtate muſt immediately veſt in his brother *Francis*, who being attainted of treaſon, the eſtate muſt be forfeited: and thereupon, by the opinion of four of the commiſſioners againſt three, a decree was made for the king.

From which decree *Sir Lawrence Anderton* appealed to the delegates, who were *Juſtice* POWYS, *Juſtice* TRACY, *Juſtice* FORTESCUE, *Baron* MOUNTAGUE, and *Baron* PAGE; and the caſe was argued at *Serjeants Inn Hall* in *Fleet-ſtreet*, by SIR PHILIP YORKE, *Solicitor General*, in behalf of the appellant, and by SIR ROBERT RAYMOND, *Attorney General*, for and in behalf of the commiſſioners.

THE COUNSEL *for the appellant* inſiſted, that there were two reaſons which might induce the Court to reverſe this decree: FIRST, For that it does not appear that the appellant is a *monk profeſſed*; for though upon his examination he confeſſed he was A MONK, yet he may be a *monk*, and not a *monk profeſſed*; but if he was (which is not proved in this caſe) yet he is capable of taking this eſtate; for though at common law, *a monk profeſſed* was dead in law, and by conſequence incapable of taking an eſtate, yet ſince ſuch diſability did ariſe by ſome canons of the popiſh church (which was the ruling church at that time), and thoſe canons being now aboliſhed by act of parliament, and there is no means left to try whether a man is *a monk profeſſed*, or not; therefore ſuch profeſſion ſhall work no incapacity in any man to take and enjoy an eſtate; ſo that if it could be proved, that the appellant was *a monk profeſſed*, yet this decree ought to be reverſed.

ON THE OTHER SIDE *it was argued for the reſpondents*, that the appellant being taken into and living in *a convent* in foreign
* [56] * parts, there could be no poſſible means of proving him *a monk*, but by his own confeſſion; and he having upon his examination confeſſed himſelf to be *a monk*, it muſt neceſſarily follow he is profeſſed, becauſe he is not a monk till profeſſion. And as a monk profeſſed was by the common law of *England* made incapable of taking or enjoying an eſtate, becauſe he was accounted dead in law; ſo it was not by the canons alone of the popiſh church, but even by the common law of this nation, that ſuch incapacity did ariſe; therefore the ſame diſability ſtill remains, unleſs it can be ſhewed that there is ſome ſtatute which enables a monk profeſſed to take and enjoy an eſtate, which they do not on the other ſide pretend to ſhew.

THE SOLICITOR GENERAL *replied*, that, if to ſay a man is *a monk* muſt imply that he is *a monk profeſſed*, then the conſtant addition

addition of that word in our law-books would be impertinent, which it is not, for it is always uſed to ſhew the difference between a monk and a *monk profeſſed*. But admitting the appellant is a *monk profeſſed*, yet the law, as now eſtabliſhed, doth not take any notice of ſuch profeſſion; and if it was a diſability, it is not ſo now, becauſe there is no method of trying, whether a man is a monk profeſſed, or not, for the trial at common law was by the certificate of the biſhop; but as the law now ſtands, no biſhop can certify a profeſſion of being *a monk*; therefore it would be a very great hardſhip if this ſhould work an incapacity, when there is no means of trying it; and if it cannot be tried, then it is plain that the law doth not take any manner of notice of it.

SIR LAWRENCE ANDERTON, BARONET, *againſt* COMMISSIONERS OF FORFEITED ESTATES.

THE DECREE was reverſed by the opinion of the other four againſt MOUNTAGUE, ſo far as to order, that the appellant might bring an ejectment againſt the commiſſioners, and try his title at law; and that the decree ſhould not ſtand in his way.

But in a little time afterwards *Sir Lawrence* took the oaths, and received THE COMMUNION according to the church of *England*, and became *a proteſtant*, and ſo enjoyed his eſtate without any farther trial.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of George the First,

IN

The Year

1722,

IN

The Court of Chancery.

The Earl of Macclesfield, *Lord Chancellor.*
Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Halfpenny *against* Udale. Case 26.

Ex relatione Magistri BUCKLEY.

Chancery will assist provision for younger children.

BY A MARRIAGE-SETTLEMENT, lands were conveyed to the husband for life, to the wife for life, to trustees to preserve contingent remainders, remainder to the first and every other son in tail, remainder to *A.* and *B.* for five hundred years to raise younger childrens portions, &c.; whereas the term for five hundred years ought to have been created precedent to the limitation in tail to the first son. The first son, when he came of age, by a recovery, cut off the term for years.

To be relieved against which recovery, and that some provision may be made for the younger children, a bill was exhibited in chancery.

SIR JOSEPH JEKYLL, *Master of the Rolls*, upon hearing the cause, made a decree accordingly; for it plainly appears to be the intent of the parties, that the younger children should be provided for, which this Court ought to assist.

Newland

Caſe 27.

Newland *againſt* Sheppard.

A *freeman of London* having one daughter, and ſeveral grandchildren by her, deviſed his perſonal eſtate to pay debts and legacies; and afterwards what remained to be ſold, and the money ariſing by ſale, (viz.) the intereſt, to be paid to his grandchildren, ſhare and ſhare alike, until of age, but did not diſpoſe the principal ſum; and now his daughter, who was heir at law, and her huſband, exhibit a bill to have the principal.

THE PLAINTIFF married the daughter and heir of *Sheppard*, a freeman of *London*, by whom he had iſſue one ſon and ſeveral daughters; which ſaid *freeman*, by his laſt will, deviſed his freehold lands to the defendant his wife for life, remainder to his grandſon (who was the ſon of the plaintiff) for life, remainder in tail to his firſt ſon, &c. with like remainders to his grand-daughters, according to their ſeniority, and not as *coparceners*; and as for his perſonal eſtate, he deviſed, that after his debts and legacies were paid, the reſidue ſhould be placed out at intereſt, and that the ſaid intereſt ſhould be paid to his ſaid grandchildren, ſhare and ſhare alike, until they were of the age of twenty-one years (*a*), but did not diſpoſe of the principal.

And now the plaintiff exhibited his bill to have two thouſand pounds, part of the portion of his wife, which was unpaid at the time of the death of her father (*b*), the ſaid teſtator, with intereſt for the ſame in nature of a creditor, and for an account of his perſonal eſtate, which, by the cuſtom of *London*, did belong to his (the plaintiff's) wife, as only child to the teſtator, her father, who had made no diſpoſition thereof (*c*).

* The defendant, the widow, owned in her anſwer, that the teſtator was a freeman of *London*, but inſiſted, that the plaintiff's wife was advanced in his life-time, and ſo is not entitled to any part of his perſonal eſtate, unleſs ſhe puts her ſhare in *hotchpot* (*d*); and ſhe ſubmits to pay the two thouſand pounds, but without intereſt, and inſiſts on the deviſe of the real eſtate to her for life, &c.

* [58]

S. C. 2. Eq. Ab. 329.
S. C. 2. Peer. Wms. 194.

(*a*) The teſtator, after diſpoſing of ſome part of his real eſtate, and of ſome legacies, deviſed the reſidue of his real and perſonal eſtate unto truſtees, their heirs, executors, and adminiſtrators, in truſt to pay and apply the *produce* and intereſt thereof for the maintenance and benefit of ſuch of his grandchildren by his ſaid daughter *Newland* as ſhould be living at the time of his deceaſe, until his ſaid grandchildren ſhould come to the age of twenty one years, or be married; and that if all his truſtees ſhould die, his ſon-in-law *Newland* ſhould be a truſtee. S. C. 2. Peer. Wms. 194.

(*b*) The teſtator agreed to give the plaintiff in marriage with his daughter the ſum of 7000l. to be paid by inſtalments of 1000l. a-year, and had paid 5000l. of this portion, but died before the other inſtalments became due. 1. Eq. Abr. 251.

(*c*) But now by 11. *Geo.* 1. c. 18. ſ. 17. "A freeman of the city of *London* may "give, deviſe, will, and diſpoſe of his "perſonal eſtate to ſuch perſon and to "ſuch uſe as he ſhall think fit, any cuſ-"tom or uſage of or in the ſaid city, or "any bye law or ordinance made or ob-"ſerved within the ſame, to the contrary "notwithſtanding: PROVIDED NEVER-"THELESS, he may agree, by any writ-"ting under his hand, upon or in conſi-"deration of his marriage, or otherwiſe, "that his perſonal eſtate ſhall be ſubject "to, or be diſtributed according to, the "cuſtom: AND IF ſuch freeman ſhall "die inteſtate, the perſonal eſtate of "ſuch perſon ſo making ſuch agreement, "or ſo dying inteſtate, ſhall be ſubject "to, and diſtributable according to, the "cuſtom of the city:" and for the cuſtom of *London* on this ſubject, ſee 7. Viner's Abr. 214.

(*d*) See Phiney *v.* Phiney, 2. Vern. 638. Edwards *v.* Freeman, 2. Peer. Wms. 435. S. C. 1. Eq. Abr. 252. Wood *v.* Fettyplace, 2. Vern. 629. Jenks *v.* Holford, 1. Vern. 61. Chaſe *v.* Box, 1. Ld. Ray. 484.

And

NEWLAND *againſt* SHEPPARD.

And on reading the proofs it appeared, that the portion of the plaintiff's wife carried intereſt from the day of her marriage, though part of it was not payable in ſeveral years afterwards.

Whereupon IT WAS DECREED, that the ſaid two thouſand pounds, with intereſt, ſhould be paid (*a*), and that an account be taken by THE MASTER what the teſtator died worth, and then the Court would conſider what was to be done with the principal money not diſpoſed; but declared, that it would be a hard conſtruction of this will, that the grandchildren ſhould have the intereſt thereof during their minority, and no ſhare of it when they came of age (*b*).

And as to the meaſure of the account to be taken by THE MASTER, it being inſiſted, that it ſhould be according to the computation of the value of the perſonal eſtate at the time of the death of the teſtator, and not as leſſened by any accident;

THE COURT declared, that if the eſtate had increaſed in the hands of the executor, the plaintiff would have expected the benefit of ſuch increaſe; and it is but equitable that he ſhould be contented with the loſs; but that being occaſioned by the *South-Sea Company*, the act of indemnity diſcharges all truſtees and executors.

And as to the principal ſum undiſpoſed, THE COURT took time to conſider of it, in reſpect to the children, until THE MASTER had made his report.

(*a*) See 1. Eq. Abr. 251.
(*b*) See Rex *v.* Melling, 1. Vent. 230. Kentiſh *v.* Newman, 1. Peer. Wms. 234. Targus *v.* Puget, 2. Vezey, 194. Hewit *v.* Ireland, 1. Peer. Wms. 427. Peat *v.* Powell, Ambl. 387. White *v.* Barber, Ambl. 701 Fonnereau *v.* Fonnereau, 3. Atk. 326.

Aſhton *againſt* Bretland.

Caſe 28.

THE PLAINTIFF exhibited a bill againſt the defendant to be quieted in the poſſeſſion of certain lands which he held by leaſe under the defendant, who had brought an ejectment, and endeavoured to turn him out.

The caſe was as followeth:

Serjeant Bretland granted a leaſe of theſe lands to one *Aſhton* for ninety-nine years, if three lives (naming them) or any of them ſhould ſo long live; which leaſe was granted upon a ſurrender of an old leaſe of the ſame lands to *the Serjeant*, * and was to be purſuant to the covenants in the old leaſe, one of which was, that it was mutually covenanted, that upon the death of any of the three lives, the leſſee ſhould ſurrender the old leaſe, "if it was his will ſo "to do;" and thereupon *the Serjeant* covenanted, that upon ſuch

If in a leaſe determinable on three lives it is covenanted, that on the death of one the leſſee may, if he pleaſe, ſurrender, and that the leſſor ſhall thereupon, and upon payment of a fine, grant a new leaſe for three lives in the terms of the old leaſe, and in the new leaſe the covenant to ſurrender as a life drops be made abſolute equity will aſſiſt the leſſee to retain poſſeſſion, as if the prior leaſe had continuance.—S. C. 2. Eq. Abr. 57. Poſt. 112. Prec. in Ch. 76. 102 Ch. Rep. 29. 2. Peer. Wms. 217. 1. Vezey, 387. 238. 2. Com. Dig. "Chancery" (2. T. 7.).

ASHTON against BRETLAND.

ſurrender and payment of an heriot and eight pounds, he would grant a new leaſe for three lives, &c.

Now in this new leaſe, the covenant was drawn, that *Aſhton*, on the death of any of the three lives, would abſolutely ſurrender the ſame, and pay a heriot and eight pounds.

And one of the lives being now dead, and the plaintiff refuſing to ſurrender this leaſe, and renew it upon payment of the ſaid heriot and fine, the defendant brought an ejectment, and the plaintiff exhibited this bill, and got an injunction, the end of which bill was to be relieved againſt the covenant in the new leaſe, and that for two reaſons.

FIRST, Becauſe *Serjeant Bretland* had ſo ſettled his eſtate, that the now defendant was only tenant for life, and by conſequence, if he ſhould ſurrender the leaſe, the defendant had no power to grant a new leaſe for three lives; ſo that ſince the plaintiff cannot have the benefit of the covenant for his advantage, it is not reaſonable that he ſhould be obliged to the performance of that part of the ſame covenant to his diſadvantage; and that the defendant ſhould be at liberty to take any advantage of a diſability occaſioned by his being made tenant for life.

SECONDLY, It was ſuggeſted in the bill, and likewiſe proved, that this new leaſe differed from the old leaſe, which was to be the rule of the new one; for that it was drawn by *the Serjeant* himſelf, with a covenant, that the leſſee ſhould abſolutely ſurrender the ſame upon the death of any of the lives, and pay a heriot and eight pounds, when the old leaſe was to ſurrender, "if it was his will ſo "to do," which is not obligatory, but left to his diſcretion; but by the new leaſe he is bound to ſurrender, and renew, and pay an heriot and fine upon the death of every life.

All which appearing on proofs, THE LORD CHANCELLOR decreed, that ſince the plaintiff was a purchaſer of this leaſe (as every leſſee is), the ſubſequent ſettlement made by *the Serjeant*, by which the defendant is made tenant for life, ſhall not prejudice him (the plaintiff), nor forejudge him of the benefit of any covenant in his leaſe; ſo as to that point, there is no reaſon to excuſe the plaintiff for non-performance of the covenant on his part, becauſe the
* [60] defendant * is to all intents liable to perform that covenant on his part.

But as to THE SECOND POINT it is clear, that *the Serjeant* himſelf (who drew the new leaſe) did draw it in a different manner from the old one, which ſhould have been the ſtandard to guide him, and that it was drawn for his own advantage; but in equity it ſhall be taken as if it had ſquared with the old leaſe; ſo that if the leſſee is not willing to renew, he ſhall be quieted in his poſſeſſion under the new leaſe as if he held by the old leaſe.

Mead

Mead *againſt* Caſwell.

Caſe 29.

A goldſmith's note was given in part of payment of money on a *Saturday*, and not offered to the drawer until the *Monday* following; this is no new credit given to the drawer, but the indorſer is ſtill liable.

THIS was a bill brought by the plaintiff to be relieved againſt a verdict and judgment at law (*a*).

THE CASE upon the pleadings was thus: The plaintiff in the year 1720 gave a note drawn by *Cox and Cleve*, goldſmiths, for ſeventeen hundred and fifty-eight pounds, to the defendant, in part of payment of money due to the defendant from the plaintiff. It is a cuſtom among the goldſmiths in *London* to balance their accounts every day, but eſpecially on every *Saturday*, when they clear up the accounts of the whole week. This note was delivered to the defendant on a *Saturday*, about eleven of the clock in the morning, and he might have received the money that very day of the goldſmiths; but he did not offer the note to them until the next *Monday*; and then, about ten in the morning, he offered it, which the caſhier cancelled; and the ſervant might have received the money (as the plaintiff ſuggeſted) if he had ſtayed, for that the goldſmiths *Cox and Cleve* had paid above twenty thouſand pounds that morning, but the ſervant went away; ſo that it was through the defendant's negligence the money was not paid, and that his delay from eleven o'clock on *Saturday* until five in the afternoon on the *Monday* following was a new credit given by him to thoſe goldſmiths; and for that reaſon, he (the plaintiff) inſiſts, that the defendant ſhall not have recourſe to him (the plaintiff); and the rather, becauſe his note was cancelled by the caſhier, who gave another note of the ſame date, and for the like ſum, at five of the clock in the afternoon of that *Monday*; but it was after thoſe goldſmiths were become bankrupts; upon which note the verdict and judgment was had: and the plaintiff * inſiſts, that he cannot, by virtue of ſuch note, be accounted by the commiſſioners of bankrupts to be a creditor to theſe goldſmiths within any of the ſtatutes of bankruptcy, though this note bears even date with the original note ſo cancelled; for that the time of making it is the true date, which was after they were bankrupts.

* [61]

ON THE OTHER SIDE it was confeſſed, that this note was received by the defendant on a *Saturday*, and that the cuſtom amongſt goldſmiths in *London* is as ſuggeſted by the plaintiff; but that it is likewiſe the cuſtom amongſt them for one ſervant to go every day to offer all the notes paſſed to his maſter that day to them who drew ſuch notes, and to receive the money, and when he returns home to make a ſeparate entry of all which he received, and then to pay it over to the caſhier. That on that very *Saturday* the defendant had received ſeveral goldſmiths notes as payment, and which were drawn by them who lived at *Charing-Croſs*, *Covent-Garden*, and in the *Strand*, which notes he ſent by his ſervant on that very day to the ſeveral goldſmiths who drew the ſame in that

(*a*) See Hayward *v.* Bank of England, 1. Stra. 550.

MEAD against CASWELL.

part of the town, and his ſaid ſervant did on that *Saturday* receive of thoſe goldſmiths twelve thouſand pounds for his (the defendant's) uſe, in his way of trade. That it is likewiſe a cuſtom amongſt goldſmiths not to pay any money after five of the clock in the afternoon, but to employ the reſt of the day in adjuſting their accounts; and that his ſervant returned from that end of the town on that *Saturday* about half-an-hour after four, and began to enter in his books all the ſums he had then received; but before he could make an end, the hour was paſt for payment of money amongſt merchants, which was the reaſon he did not offer this note on *Saturday* to the goldſmiths who drew it. That on the next *Monday* morning he ſent his ſervant with the note to the drawer, and gave him no order to ſtay, only to demand payment of the money; but that he accordingly offered the note to the drawer, which the caſhier cancelled, and deſired the ſervant to call in half-an-hour, for that *Cox and Cleve* were gone to *the Bank* to receive money. Thereupon the ſervant went away, and returned within half-an-hour; and not receiving the money at that time, he called twice more at the ſhop; and not receiving any, he returned to his maſter (the defendant), and told him, that the * goldſmiths could not pay it: whereupon the defendant went to their houſe, and finding the note cancelled, he had no remedy, but procured a new note of the ſame date with the original note, and for the ſame ſum; on which he obtained a verdict and judgment, and inſiſted, that the note is no payment of the money, unleſs the defendant had given the goldſmiths ſome new credit, which he denied that he had given; and therefore inſiſted to have this bill diſmiſſed with coſts, and to be at liberty to take out execution on his judgment.

* [62]

THE COURT decreed, that though it appears there was ſome negligence in the defendant's ſervant, in not ſtaying to receive the money on *Monday* morning, when the caſhier cancelled the note in his preſence, yet it would be hard to make the defendant ſuffer thereby. Therefore the Court diſmiſſed the bill with coſts (*a*).

(*a*) See Hankey *v.* Trotman, 1. Black. Rep. 1. Taſſell *v.* Lewis, 1. Ld. Ray. 743. Holm *v.* Bary, 1. Stra. 415. Tinner *v.* Mead, 1. Stra. 416. Manwaring *v.* Harriſon, 1. Stra. 508. Eaſt India Company *v.* Chitty, 2. Stra. 1175. Fletcher *v.* Sandys, 2. Stra. 1248. Hoar *v.* Da Coſta, 2. Stra. 910. Metcalf *v.* Hall, Beawes L. M. 482. Appleton *v.* Sweetapple, Bailey on Bills, 32.

Caſe 30.

Aliſon's Caſe.

The mother gave a bond to her ſon, conditioned to ſurrender a copyhold eſtate to him, of which ſhe was heir. DECREED, that ſhe was a truſtee for her ſon.—S. C. 10. Mod. 515. 1. Ch. Caſes, 39. 171. 3. Ch. Rep. 4. 2. Peer. Wms. (630). 2. Com. Dig. "Chancery" (4. I.).

THE PLAINTIFF exhibited a bill againſt her niece for a moiety of a copyhold eſtate, which ſhe claimed in coparcenary with her ſaid niece, by deſcent from *T. A.* her brother.

The caſe was thus:

One *Aliſon*, the plaintiff's uncle, was ſeiſed of the inheritance of a conſiderable copyhold eſtate, and having no iſſue intended to

leave

leave it to his nephew *T. A.* the plaintiff's brother; but being taken ill, he had no time to ſurrender to the uſe of his will, and for want thereof the eſtate would deſcend to his ſiſter, who was his heir at law, and mother of the plaintiff; and to prevent ſuch deſcent, the ſaid *Aliſon* procured his ſaid ſiſter to enter into a bond of two thouſand pounds to the ſaid *T. A.* her ſon, conditioned, that at any time upon his requeſt ſhe would convey the ſaid copyhold lands to him and his heirs. Purſuant to this agreement *T. A.* entered after his uncle's death, but without any conveyance from his mother, and ſome time afterwards he died without iſſue, but had two ſiſters, one of them entered, and ſurrendered to the uſe of her will, and deviſed this eſtate to her grand-daughter, and died. ALISON'S CASE.

And now the ſurviving ſiſter exhibited this bill to have a moiety of the eſtate in coparcenary with her niece, as heir to her brother *T. A.* deceaſed.

* THE COUNSEL *for the plaintiff* inſiſted, that upon the foot of the agreement with her uncle *Aliſon*, and the bond of two thouſand pounds which his ſiſter gave to ſurrender at any time when *T. A.* her ſon ſhould require it, that ſhe ſhall be deemed as a truſtee for her ſon, eſpecially ſince ſhe had carried the agreement into execution, by permitting him to poſſeſs the land during her life, though ſhe was heir at law to her brother *Aliſon*. And this is a ſtronger caſe than that where the father being about to make his will, and intending to make an executrix, his ſon ſaid, that if he (the father) would appoint him, the ſon, to be executor, it would give him ſome countenance in the world: and that if his father would do ſo, he, the ſon, would be only a nominal executor, and that his mother ſhould have the benefit of it; whereupon he was made executor; but after the death of his father he inſiſted on the benefit of the executorſhip: which was ſet aſide by the decree of this court made by the *Lord Chancellor* COWPER, upon proof of this promiſe, though there was nothing in writing (*a*). * [63]

And in the principal caſe, THE LORD CHANCELLOR decreed, that the mother was a truſtee for her ſon (*b*); and therefore, that the defendant ſhould ſurrender to the uſe of the plaintiff, and both of them be admitted as coparceners.

(*a*) Neeve and Others *v.* Keck, poſt. 106. Thynn *v.* Thynn, 1. Vern. 296.
(*b*) See Herbert *v.* Lownds, 1. Ch. Rep. 13. Deveniſh *v.* Baines, Prec. Ch. 3. Barnſley *v.* Powell, 1. Vezey, 287. Sellach *v.* Harris, 5. Viner Abr. 521. Maxwell *v.* Montacute, Prec. Ch. 526. and Mr. Fontblanque's Equity, 2 vol. 38.

Waller *againſt* King. Caſe 31.

THIS was a bill brought againſt the defendant to ſet aſide an award, and alſo a judgment and execution got on a bond, and a warrant of attorney extorted from the plaintiff *Waller* by dureſs,

The court of chancery will not vacate an award, on the grounds of its being unreaſonable, and that the party, after notice to attend, was not heard.—S. C. 2. Eq. Abr. 92. 1. Roll. Rep. 380. Chan. Caſes, 270. 2. Ch. Caſes, 140. 1. Vern. 157. 259. 1. Ch. Rep. 141. 2. Com. Dig. "Chancery" (2. K. 6.). Kyd on Awards, 236.

WALLER *againſt* KING.

and to have reſtitution of the money levied by ſale of goods taken in execution.

The caſe was thus:

The plaintiff *Waller* was arreſted at the ſuit of the defendant, and thereupon both parties ſubmitted all differences between them to two arbitrators; and that if they could not agree in an award, then to an umpire; and the arbitrators not agreeing, the umpire awarded thirty-ſix pounds to be paid by the plaintiff to the defendant, without hearing the plaintiff. Thereupon an action of debt was brought againſt him for non-performance of the award; and being under an arreſt, a bond was extorted from him, and a warrant of attorney thereon to confeſs judgment, which was entered
* [64] and * execution taken out, and goods were levied to the value of forty pounds; all which the plaintiff prayed might be ſet aſide.

The defendant in his anſwer ſet forth, that he held lands by leaſe under the plaintiff; and that being indebted to ſeveral perſons, the plaintiff, his leſſor, perſuaded him, the defendant, to make over his goods, and to deliver up his leaſe to him, the plaintiff, on purpoſe to protect the ſame againſt his creditors, which was done accordingly; but that the plaintiff abuſed the truſt, and inſiſted that the goods were his own, by an abſolute ſurrender made thereof by the defendant: and this being the greateſt cauſe of difference between them, it was referred to arbitration; and all this matter appearing to the arbitrators in the preſence of the umpire, he made the award, &c.

THE COUNSEL *for the plaintiff* argued, that the award ought to be ſet aſide, becauſe it was made without the privity of the plaintiff, and therefore he could make no defence againſt it; and that it was a very unreaſonable award (*a*), becauſe it appeared upon the proofs, that the plaintiff had goods of the defendant to the value only of ſeven pounds ten ſhillings, and no more, and yet he was awarded to pay thirty-ſix pounds, which is a very hard award.

THE COURT would not ſet aſide the award upon account of any hardſhip therein, becauſe the arbitrators were judges of the party's own chuſing (*b*), and the plaintiff had notice, and might have been heard if he pleaſed.

Therefore IT WAS DECREED, that the bill ſhould ſtand diſmiſſed, with coſts.

(*a*) That an award muſt be reaſonable, ſee 1. Roll. Abr. "Arbitrament," B. 12. Linſey *v.* Aſhton, 2 Bulſt. 39. Anonymous, 1. Keb 92. Tavener *v.* Shingley, Cro. Car. 236. Alley *v.* Cox, 3. Keb. 479. Godfrey *v.* Godfrey, 2. Mod. 304.

(*b*) See Jones' Caſe, 1. Roll. Rep. 380. Brown *v.* Brown, 2. Ch. Caſes, 140. S. C. 1. Vern. 157.

Wright

Wright *againſt* Hobert.

Caſe 32.

UPON an appeal from a decree of commiſſioners of charitable uſes (*a*),

A grant of land to charitable uſes, *viz.* "that "as many of "the inhabi- "tants of the "pariſh of *A.* "as were able "to buy three "cows might "feed them on "the land from "*May* to *Au-* "*guſt*," extends to every inhabitant who has three cows.

THE CASE was: A certain piece of land called *the Lizard*, in the pariſh of *Wimmerton*, containing about forty acres of paſture, was formerly the inheritance of two perſons, who ſeveral hundred years paſt conveyed the ſame to truſtees and their heirs, to the uſe of themſelves, and the ſurvivor of them, for life, and after their deceaſe, to the intent, that as many of the inhabitants of that village as were able to buy three cows might put them there to graſs, in the day-time, from the firſt *Monday* in *May* to the firſt day of *Auguſt* for ever; and from that day to be in common for all the inhabitants * there until *Lady-Day* following, and then to be incloſed for raiſing the graſs until the firſt *Monday* in *May* for ever.

* [65]

But this grant not appearing before the commiſſioners, it was pretended that the lands were given to the poor of that pariſh; and that about one hundred years paſt, the town and the church where this grant was kept, were burnt; and ſo the evidence that it was given to the poor was deſtroyed by fire (*b*). S. C. Duke, 164.

Whereupon the commiſſioners decreed, that *Sir John Hobert*, who was lord of the manor, ſhould make a feoffment of theſe lands to the uſe of himſelf and others, and their heirs, in truſt, to put out ſome of the poor boys of that pariſh every year to ſome trades.

From which decree the plaintiff appealed (*c*), and objected againſt it, that there was no proof before the commiſſioners that this land was given to the uſe of the poor of that pariſh; ſo that they had no power to make ſuch a decree.

And now, upon producing the original grant before the commiſſioners (which was not burnt, as it was ſuggeſted), it appeared to be as above mentioned, by which no manner of difference was made by the grantors between the rich and the poor inhabitants (*d*) of that village.

THE COURT was not ſatisfied why this original grant was not produced before the commiſſioners, but ſaw no colour to judge that theſe lands were given to the uſe of the poor, for that by the grant itſelf the contrary appeared; and it was proved, that the uſage had been according to the grant for ſixty years paſt; therefore there being no proof that this was given to the poor, excluſive of the reſt of the inhabitants, the commiſſioners had no authority to make ſuch a decree; for which reaſon it ought to be reverſed.

(*a*) See 43. *Eliz.* c. 4. 9. *Geo.* 2. c. 36.
(*b*) See Aſkew *v.* The Poulterers Company, 2. Vezey, 89. Clavering *v.* Clavering, 2. Vezey, 233.
(*c*) Burford *v.* Lenthall, 2. Atk. 551.
(*d*) See Duke on Charitable Uſes, 132.

WRIGHT *against* HORLAT.

And IT WAS DECREED, that every inhabitant who had three cows should put them to graſs on theſe lands, &c. as in the original grant, &c.

That if this manner of grazing had been by preſcription or uſage, no perſon but the inhabitants of antient meſſuages could be entitled to it; but it is otherwiſe appointed by the grant (*a*) of the donors; and that there is no colour of coſts (*b*) againſt the commiſſioners, who conteſted nothing in their own right; not but that the Court would have puniſhed them, if it had appeared they intended to oppreſs.

(*a*) Baylis *v.* Attorney-General, 2. Atk. 239. Attorney-General *v.* Middleton, 2. Vezey, 327. 6. Com. Dig. "Uſes" (N. 21.).

(*b*) Aylet *v.* Dodd, 2. Atk. 238. Burford *v.* Lenthall, 2. Atk. 550. Jones *v.* Coxeter, 2. Atk. 400.

Caſe 33.

* Anonymous.

If a *Dutchman* be poſſeſſed of real eſtate in *Holland*, and perſonal eſtate in *England*, and deviſe his real eſtate to *A.* and his perſonal to *B.* the perſonal eſtate ſhall be firſt applied to pay his debts in *Holland*, though real eſtate there is liable to debts.

Bunb. 260. 3. Peer. Wms. 322. 1. Brown. 58. 2. Com. Dig. "Chancery" (3 A. 3.).

THE TESTATOR, who lived in *Holland*, and who was ſeiſed of a real eſtate there, and of a conſiderable perſonal eſtate in *England*, deviſed all his real eſtate to the plaintiff, and all his perſonal eſtate to the defendant, whom he made executor, and died. But at the time of his death he owed ſome debts by ſpecialties, and ſome by ſimple contract in *Holland*, and had no aſſets there to ſatisfy thoſe debts, other than by his real eſtate, which, by the cuſtom and laws of *Holland*, is made liable to the payment of debts upon ſimple contract as well as upon ſpecialties, if there are not perſonal aſſets to anſwer the ſame, eſpecially debts upon ſimple contract for ſervants wages or for work done.

Now the creditors in *Holland* ſued the plaintiff there, to whom the real eſtate was deviſed, and had a ſentence againſt it, by virtue whereof it was ſold for the payment of their reſpective debts.

Thereupon the plaintiff exhibited this bill againſt the defendant, who was executor, and to whom the perſonal eſtate was deviſed as aforeſaid, that he (the plaintiff) might be re-imburſed by the defendant for the loſs he had ſuſtained in not bringing the perſonal eſtate to *Holland* to diſcharge the debts there in aid of the real eſtate.

An exemplification of a ſentence in *Holland*, under the common ſeal of THE STATES, may be read in evidence in a ſuit in chancery.

10 Co. 93. Bull. N. P. 226.

Upon hearing this cauſe, the plaintiff produced an exemplification of the ſentence in *Holland*, under the common ſeal of THE STATES, in evidence, without any farther proof that ſuch ſentence was given there; for which reaſon,

THE COUNSEL *for the defendant* objected againſt the reading it; and this upon the authority of the caſe of *Swinnerton v. Goddard*, in the houſe of lords, where it was ſettled, that the exemplification of any judgment or ſentence in any court, where the

Sayer, 297. 2. Vent. 170. 2. Lev. 108. Hard. 120. 1. Mod. 117. 2. Ld. Ray. 893. Comp. 318. 322. 596.

proceedings

proceedings were by different laws from the laws of *England*, ANONYMOUS. ſhould not be given in evidence without farther proof. That caſe was as follows: *Swinnerton* being a *Scotſman*, and here in *England*, became indebted to *Mr. Goddard*, who obtained a judgment in the court of king's bench againſt him; thereupon *Swinnerton* retired to *Scotland*, where he had ſome effects; and *Mr. Goddard* got an exemplification * of his judgment here, which he produced in evi- * [67]
dence before the lords of the ſeſſion in *Scotland*, upon a ſuit he brought there againſt *Swinnerton*; but that Court would not admit it to be read without farther proof, but gave ſentence againſt *Mr. Goddard*; who thereupon appealed to the houſe of lords here, and the ſentence of the lords of the ſeſſions was affirmed; and in the affirmance of that ſentence a parallel caſe was cited, where in an appeal from *Ireland*, for that THE LORD CHANCELLOR there had founded his decree on the exemplification of a ſentence given by the lords of the ſeſſions in *Scotland*, without any farther proof, that decree was reverſed in the houſe of lords here for that and for no other reaſon.

ON THE OTHER SIDE *it was inſiſted*, that judgments are tranſferrable by exemplifications from one court to another; and this is ſeen by daily experience, where judgments in the civil law courts, as in the admiralty, are transferrable to other courts, &c. (*a*).

THE COURT. The principal caſe differs from that of *Swinnerton v. Goddard*; for the plaintiff does not make the exemplification of the ſentence in *Holland* the ground of his demand, farther than to ſhew, that there was a ſentence there; for he muſt give the will and other proofs in evidence to make out his right, and then to ſhew how he was damnified. The plaintiff complains of a ſentence given in *Holland*, and certainly he muſt be allowed to prove, that there was ſuch a ſentence; and this is done by the exemplification of it; and he does not found any demand here upon the ſentence itſelf; but it is only to ſhew the Court that he ſuffered there; and he muſt give other proof to ſhew, that it was occaſioned by the defendant, and in what manner; for that is the ground of the complaint in this court, and not any wrong by the ſentence itſelf (*b*).

Now by the laws of *Holland*, all debts ſhall affect the real eſtate there; but it is there, as it is here, that the perſonal eſtate ſhall come in aid of the real eſtate, and be charged in the firſt place; therefore the perſonal eſtate in this caſe ſhould anſwer the loſs the

(*a*) 1. Roll. Abr. 678. Bull. N. P. 245. Cowp. 322.

(*b*) How far the ſentences of foreign courts of competent juriſdiction are taken notice of as concluſive evidence by the courts in *England*, ſee Blackham's Caſe, 1. Salk. 290. Burton *v.* Fitzgerald, 2. Stra. 1078. Hughes *v.* Cornelius, 2. Show. 232. Ray. 473. Skin. 59. Ewer *v.* Jones, 2. Ld. Ray. 936. Barnardi *v.* Motteux, Dougl. 54. Barazelly *v.* Lewis, Park on Inſurances, 359. Saloneci *v.* Woodham, Park. 362. Saloneci *v.* Johnſton, Park, 364. Mayne *v.* Walter, Park, 363. Ladbroke *v.* Cricket, 2. Term Rep. 649. Galbraith *v.* Neville, Dougl. 6. *notis*.

plaintiff

ANONYMOUS. plaintiff ſuſtained by the ſale of the real eſtate, though that happened in a different dominion.

See Brook, "Cuſtom," 43. Therefore IT WAS DECREED, that the plaintiff ſhould be reimburſed.

* [68]

Caſe 34.

* Acherley *againſt* Vernon.

If a teſtator deviſe "all the reſt "and reſidue "of his real and "perſonal e- "ſtate to *A. B. C* and *D.* in "truſt;" and afterwards makes a codicil, whereby he "ratifies and "confirms his "will, except "in the altera- "tions after "mentioned;" and then revokes that part of his will whereby he appointed *A.* and *B.* his truſtees, and requeſts *E.* and *F.* to be two of his truſtees, and deviſes his real eſtate to them accordingly; this is only a revocation as to the appointment of the two truſtees, and not of any other part of the will.

THIS was a bill exhibited by *Roger Acherley, Eſq.* and his wife, and *Lætitia* their daughter, the wife being ſiſter and heir at law to *Thomas Vernon, Eſq.* deceaſed.

THE BILL ſets forth, that *Thomas Vernon* was ſeiſed in tail of ſome lands, and of other lands for life, and was poſſeſſed of a perſonal eſtate to the value of eighty thouſand pounds at the time of his death; and being ſo ſeiſed and poſſeſſed, he made his laſt will in the year 1711 (*a*), and thereby, after ſome legacies given to particular perſons, deviſed "all his real and perſonal eſtate to four truſtees "(naming them) in truſt, that they ſhould permit the defendant "*Bowater Vernon* to receive the profits of his real eſtate for life, "remainder to his firſt ſon in tail, &c.; and that the ſaid truſtees "ſhould lay out his perſonal eſtate in a purchaſe of lands, which, "when purchaſed, ſhould be ſettled to the ſame uſes, &c.;" and he deviſed to his ſiſter (the now plaintiff) *Mrs. Acherley* two hundred pounds a-year during her life; and a little before his death in the year 1720 he made *a codicil*, and thereby confirmed his will, except ſuch part as was by the ſaid codicil revoked; and then he revoked that part of his will wherein *Mr. Acherley* (the now plaintiff) and one *Mr. Vernon* were made truſtees, and appointed *Mr. Keck* and *Mr. Nicholls* to be his truſtees; and deviſed to his niece *Lætitia Acherley* ſix thouſand pounds, and declared, that the ſame, and the annuity of two hundred pounds a-year, which, by his will, he had deviſed to his ſiſter for life, ſhould be in lieu of all demands they or either of them might claim of, or unto, all or any part of his real or perſonal eſtate; and upon condition they ſhould releaſe to his ſaid truſtees all their right thereunto; and all the reſt of his lands which he purchaſed ſince the making his will, and all other his real eſtate, he deviſed to his ſaid truſtees, to be ſettled according as in the will.

S. C. 10. Mod. 518.
S. C. 2. Eq. Ab. 209.
S. C. 1. Peer. Wms. 783.
S.C. Comy. 381.
S. C. 3. Pro. P. C. 107.

The plaintiffs by their ſaid bill inſiſted, that by this codicil the teſtator had *revoked* a great part of his will, and had made no other diſpoſition of what he had revoked, and conſequently that the ſame ought to deſcend to the ſaid *Mrs. Acherley* as his heir at law; AND THAT having purchaſed ſome *fee-farm rents*, iſſuing out of the manor of *Hanbury*, and having entered into *articles* for the purchaſe of ſeveral lands lying in the counties of *Worceſter, Warwick*, * and *Leiceſter*, ſince the making his ſaid will, the ſaid rents and the lands which reſted in articles would not paſs by the deviſe

* [69]

(*a*) See the will and codicil very fully ſtated, 3. Brown's Caſes in Parl. 107.

of

of "all the reſt of his lands, &c." in the codicil; and therefore muſt likewiſe deſcend.—AND THAT the ſaid teſtator had ſome valuable *manuſcripts of caſes* decreed in the court of chancery whilſt he attended that court, which the plaintiffs now claim as their right, in order to have them publiſhed in the beſt manner, as a monument of his great learning, to be tranſmitted to poſterity; and that it is a right veſted in them before any other perſon whatſoever, being his heirs at law; and therefore ſhall deſcend to them in nature of heir-looms.

The defendant *Bowater Vernon* by his anſwer confeſſes the will, and that after the making thereof the teſtator bought ſeveral lands, and entered into articles for the purchaſe of more, and that part of the purchaſe-money was paid: and having increaſed his perſonal eſtate, he made a codicil, as ſet forth in the bill; but inſiſted, that ſo much of his eſtate as reſted in articles ſhall paſs in equity by the deviſe of "all his new-purchaſed lands" in the codicil; and ſo ſhall the *fee-farm rents* iſſuing out of the manor of *Hanbury*; for that they were afterwards merged in the purchaſe of that very manor by the teſtator himſelf, who at the time of his death, and long before, was lord thereof. And farther inſiſts, that by THE CODICIL none of the deviſes in the will are revoked, but rather confirmed; but if it ſhould be a revocation of what was deviſed by the will, yet the lands ſhall paſs by that clauſe in the laſt part of his codicil, where he deviſed "all the reſt of his lands, &c." to his truſtees, &c.; ſo that he left no part of his eſtate, either real or perſonal, undiſpoſed.—And as for the *manuſcripts*, he ſubmits to the opinion of the Court, whether the truſtees ſhould have the publiſhing them, to whom the teſtator had entruſted the reſt of his real and perſonal eſtate.

The other defendant, *Mrs. Vernon*, the widow of the teſtator, by her anſwer ſays, that he left her an annuity or rent-charge of one thouſand pounds a-year during her life, beſides what lands were about his houſe at *Hanbury*, whilſt ſhe lived therein nine months in every year, and the houſehold goods and furniture of his houſe in *London*, which ſhe inſiſts to have ſecured to her as the Court ſhall think fit. * She likewiſe claims two hundred pounds which was left to her by her father *Sir Anthony Keck* to be laid out in what ſhe thought fit in remembrance of him; which two hundred pounds ſhe believes was received by the teſtator, and therefore inſiſts to have it ſatisfied out of his perſonal eſtate.—And as for the *manuſcripts*, ſhe claims them as part of the teſtator's houſhold goods deviſed to her for her life; ſo that ſhe inſiſts on her right to them, that they may be publiſhed for the credit of the teſtator, and not that ſhe claims the leaſt benefit by them.

* [70]

There was A CROSS-BILL exhibited againſt the plaintiffs in the original bill, which charges, that *Mr. Acherley* and his wife have received the annuity of two hundred pounds a-year deviſed to the wife on the condition mentioned in THE CODICIL; ſo that they are thereby concluded from any farther demand of the teſtator's eſtate,

ACHERLEY *againſt* VERNON.

eſtate, but ſhall be obliged to perform the condition and releaſe as therein is directed. And farther, that the legacy of ſix thouſand pounds deviſed to the plaintiff *Lætitia* is ready to be paid on the condition aforeſaid; and therefore that ſhe ought to determine her election, whether ſhe will accept the legacy upon the ſaid condition, or renounce it, and take what benefit ſhe may have by her title to a diſtributive part of the teſtator's perſonal eſtate.

The queſtions ariſing upon theſe pleadings were:

FIRST, Whether the revocation in the codicil of that part of the will where *Mr. Acherley* and *Mr. Vernon* were made truſtees, and appointing others, had revoked all the diſpoſitions in that clauſe of the will.

SECONDLY, Whether the lands which the teſtator had *articled* to purchaſe, and likewiſe the *fee-farm rents* of which he was ſeiſed, and which were not mentioned either in the will or codicil, ſhall paſs by the deviſe of his lands in the codicil.

THIRDLY, The teſtator having both *freehold*, *leaſehold*, and *copyhold* lands, and having in his will declared a truſt only of his *freehold* and *leaſehold* lands, without mentioning his *copyholds*, whether any truſt thereof ſhould reſult to the benefit of the heir at law.

AS TO THE FIRST POINT,

IT WAS ARGUED *for the plaintiffs*, that by revoking that part of his will where *Mr. Acherley* and *Mr. Vernon* were truſtees, he had revoked all the diſpoſitions in his will, becauſe they were truſtees in all of them, for he did not revoke * the truſt to them, but that part of his will where they were truſtees, which is every part; for they were concerned throughout the will; and though by the codicil he deviſed the "reſt of his lands to *Mr. Keck* and "*Mr. Nicholls*," yet he having declared no truſt thereof, they ſhall be ſeiſed of a *reſulting truſt* for the heir at law. It is for his benefit that revocations are favourably conſtrued, to bring back the eſtate to him; and the ſame words in a limitation of an eſtate have been enlarged in favour of the heir at law, and ſtrengthened in the conſtruction when againſt him: as for inſtance; in the caſe of *Nottingham v. Jennour* (*a*). So where a man releaſes part of a bond, it is a releaſe of the whole bond; and by the ſame reaſon, a revocation of part ſhall be a revocation of the whole (*b*).

* [71]

(*a*) This was a deviſe of lands to his ſecond ſon, *and his heirs* for ever, and for *want of ſuch heirs*, then to the right heirs of the teſtator, who died, and ſo did the ſecond ſon without iſſue, living his elder brother: Adjudged, that the ſecond ſon had an eſtate-tail, and no mere; becauſe theſe words, *and for want of ſuch heirs*, are void in point of limitation, and import no more than *want of ſuch iſſue*, becauſe the ſecond ſon could never die without heirs, ſo long as his brothers, or any heirs of his father, were living; therefore the heir at law, in this caſe, ſhall take by deſcent, and not by the will. Salk. 233.

(*b*) Co. Lit. 265. a. Cro. Jac. 390. 487. 2. Mod. 281.

As

As to THE SECOND POINT,

It was argued, that by the deviſe in the codicil of the lands purchaſed ſince the making his will, the lands for which he had *articled* ſhall not paſs, either in law or equity, as this caſe ſtands, becauſe the time of conveying them to the teſtator was not come before his death, ſo that he had no conſummate equitable intereſt therein, and conſequently could make no diſpoſition thereof (*a*).

Nor ſhall the *fee-farm rents* paſs by a deviſe of "all his lands "ſince purchaſed," for there are no deſcriptive words thereof to make them paſs (*b*). Beſides, "rents" cannot paſs by a deviſe of "lands," unleſs where the teſtator had no lands, for in ſuch caſe they ſhall paſs, to make the words of the will operate; and as for the *fee-farm rents* which iſſued out of his own manor, they were not *extinguiſhed*, but only *ſuſpended* during his life, for they could not be *merged*, becauſe his wife had an intermediate eſtate for life in the manor. Now to conſtrue that "rents" ſhall paſs by a deviſe of "lands," is a very hard conſtruction in favour of a voluntary deviſee againſt an heir at law, and there is not a caſe in any law-book to warrant it. It is true, there is a caſe in *Leonard* (*c*) where it was held, that by the deviſe of *a manor* the *rent* paſſed, but it was becauſe the teſtator had no other right * in the manor but this rent; and therefore the deviſe had been void if the rent did not paſs. But if it ſhould be objected, that by a deviſe of "lands" all his intereſt therein would paſs, this is contrary to ſeveral reſolutions in the law (*d*). Beſides, where the words are doubtful, the heir at law ſhall not be diſinherited (*e*). If it ſhould be likewiſe objected, that upon an *elegit de medietate terræ*, by the ſtatute of *Weſtminſter the Second*, "rents" were extendible, that caſe in *Cro. Eliz.* (*f*) doth not warrant it; therefore no inference can be made from thence, that by a reaſonable conſtruction "rents" ſhall paſs in a will by a deviſe of "lands." Now in that very caſe in *Croke* it is ſaid, that a rent-ſeck would not be extendible; and ſince the ſtatute *quia emptores terrarum*, if a man give lands in fee, reſerving a rent, this is a rent-ſeck in a ſubject, becauſe a tenure cannot be created at this day, and every fee-farm rent, when granted by the king, becomes ſeck, and therefore not to be extended.

If a man deviſe all his real and perſonal eſtate to truſtees, and afterwards purchaſes a *fee-farm rent* iſſuing out of his manor and *contracts* for the purchaſe of *land*, and pays part of the purchaſe-money, but before the contract is completed makes a codicil, whereby he deviſes "all "the *lands* by "me purchaſed "ſince the publiſhing of my "will to the "truſtees in "my will named," and then

* [72]

revokes the will as to two of the truſtees, and appoints two others; the fee-farm rents and after-purchaſed lands, although the purchaſe be not completed at the time of his death, and alſo all his before-deviſed real eſtate, paſs; for the *codicil* is a *republication* of his *will*.

2. Pr. Wms. 335. 3. Pr. Wms 168. Dougl. 716.

(*a*) Roe *v.* Fludd, Fort. 184.

(*b*) But ſee the caſe of the Counteſs of Bridgwater *v.* the Duke of Bolton, that *fee-farm rents* which the teſtator had contracted for at the time of his death will paſs by a deviſe of "all my real and perſonal eſtate." 6. Mod. 106. S. C. 1. Eq. Abr. 177. S. C. 1. Salk. 236.

(*c*) Inchley and Robinſon's Caſe, 2. Leon. 41. S. C. Owen, 88.

(*d*) But ſee Cro. Jac. 145. Cro. Eliz. 525. Owen, 155. 1. Lev. 212. 1. Bro. C. C. 437. 1. Burr. 268.

(*e*) Although the intention of the teſtator be ever ſo apparent, the heir at law muſt, of courſe, inherit, unleſs the eſtate is given to ſomebody elſe, *per* LORD MANSFIELD, Gaſkin *v.* Gaſkin, Cowp. 661.—See alſo Moor, 7. Dyer, 342. 2. Vern. 346.

(*f*) Walſal *v.* Heath, Cro. Eliz. 656.

As

If a man poſſeſſed of *freehold*, *leaſehold*, and *copyhold* lands, deviſe "all his "*real eſtate* to "truſtees," without mentioning his *copyholds*, yet if it appear by a codicil to have been the intention of the teſtator, the copyholds ſhall paſs accordingly, and not reſult to the heir at law.

As to THE THIRD POINT,

It muſt be admitted, that by a deviſe of "all his lands," thoſe copyholds which have been ſurrendered to the uſe of the will ſhall paſs to the truſtees (*a*); and ſo it will by the words "all his real "and perſonal eſtate," but there is no manner of truſt declared, either in the will or codicil, of his copyhold lands. The only words in the will by which any truſt is declared are, "as for and "concerning my freehold and leaſehold eſtates, the ſame ſhall be "to ſuch truſts, &c.;" which words "freehold and leaſehold" are excluſive of the copyhold: ſo that he having declared no manner of truſt of his copyhold eſtates, the truſt thereof muſt reſult to the benefit of the heir at law. It is true, by the ſtatute of Frauds (*b*), all truſts not manifeſtly ſhewn by ſome writing are made void; but this muſt be intended of an expreſs declaration of truſt, and not of any implied or reſulting truſt; and this appears by another paragraph of the ſame ſtatute, where the teſtator's intent is to be no farther admitted than it is expreſſed in the aforeſaid limitation of a truſt to a ſtranger (*c*); therefore if his intent is doubtful, it ſhall be conſtrued for the benefit of the heir, becauſe all the truſt not diſpoſed muſt reſult to ſuch heir; ſo that if the Court ſhould be of opinion, that the will is not revoked by the codicil, this copyhold muſt deſcend. But admitting no truſt is declared of the *copyholds*, it can be no imputation upon the character of the teſtator to ſay, * he made a will, and did not appoint what truſt his truſtees ſhould have in the lands he deviſed; for as great a man as he was in law, *another as great as he* hath made very ſtrange bequeſts in his will, and that was SERJEANT MAYNARD; and probably it might be the deſign of thoſe great men to exerciſe the wits of thoſe of their own profeſſion: it was clear, that this was intended by THE SERJEANT, for after ſome very unuſual diſpoſitions in his will, he takes notice, that ſome men might admire at it, but that he did not care, *valet quantum valere poteſt*.

* [73]

ON THE OTHER SIDE it was argued for the defendant:

As to THE FIRST POINT, That the principal point in this caſe was, Whether the codicil was *a revocation* of his will; and his Counſel inſiſted, that it was not, for it was no more than *an appointment* and ſubſtitution of other truſtees in the room of thoſe

(*a*) Coodwin *v.* Goodwin, 1. Vez. 226. Haſelwood *v.* Pope, 3. Peer. Wms. 322. Tendril *v.* Smith, 2. Atk. 85. Smith *v.* Baker, 1. Atk. 386.

(*b*) By 29. *Car.* 2. c. 3. ſ. 7. "All "declarations or creations of truſts or "confidences of any lands, tenements, "or hereditaments, ſhall be manifeſted "and proved by ſome writing ſigned by "the party, who is by law enabled to "declare ſuch truſt, or by his laſt will in "writing, or elſe they ſhall be utterly "void and of none effect."

(*c*) By 29. *Car.* 2. c. 3. ſ. 7. it is provided, "That where any conveyance "ſhall be made of any lands or tenements "by which a truſt or confidence ſhall or "may ariſe or reſult by the implication "or conſtruction of law, or be transferred or extinguiſhed by an act or operation of law, then ſuch truſt or confidence ſhall be of the like force and "effect as the ſame would have been "if this ſtatute had not been made."

whom

whom he had appointed before by his will; there are no expreſs words to revoke it, and a revocation ſhall be no more intended than the diſinheriting an heir, for that muſt be by expreſs words, and ſhall never be intended. Now according to ſuch conſtruction, which is contended for on the other ſide, this codicil would revoke itſelf; for by the firſt part of it he confirmed the deviſe to his firſt truſtees, and afterwards revokes the truſt to two of them, which is very inconſiſtent; but it is a more natural conſtruction, that he revoked their eſtate in the truſt, and appointed two other truſtees to the ſame truſts, as before by his will. But by the whole courſe of the will it does not appear, that the teſtator intended any part of his eſtate ſhould deſcend on his heir at law; therefore the will is not revoked by the codicil: if it ſhould, then the annuity of two hundred pounds a-year given to his ſiſter and heir at law is revoked, and ſo is the ſix thouſand pounds given to his niece, becauſe it was to iſſue out of the lands; but neither of them are revoked; and thoſe ſpecific legacies are ſufficient to exclude them from any right they may have to the perſonal eſtate of the teſtator; like the caſe of *Bethell v. Bethell* (*a*), lately at THE ROLLS, where a man deviſed *one ſhilling* to his heir at law, this was adjudged an abſolute excluſion from any right he might claim to the teſtator's eſtate.

It was inſiſted on by the will, and argued for the plaintiff, that *the manuſcripts* ſhould deſcend on the heir at law as *heir-looms*; but it cannot be preſumed that the teſtator deviſed them to his truſtees to be ſold, and the money to be laid out in a purchaſe, &c. for they are not in their nature * a perſonal eſtate for any ſuch purpoſe, and the heir at law has no pretence to have them as heir-looms, for thoſe are by cuſtom (*b*); but there can be no title by cuſtom to theſe manuſcripts, becauſe the teſtator gave them a being, for they had none before his time. * [74]

As to THE SECOND POINT, Whether the lands which the teſtator had articled to purchaſe, and the fee-farm rents, ſhall paſs by the deviſe of his lands in the codicil;

IT WAS ARGUED *for the defendant*, that they would paſs. And firſt, as to the lands which he had *articled* to purchaſe, thoſe lands muſt be either a real or perſonal eſtate; it will be abſurd to ſay they are neither; and if they are either, then there are ſufficient words in the codicil to paſs them; for the teſtator takes notice therein, that he had purchaſed lands ſince the making his will, which word "lands" ſhall extend as well to thoſe for which he had articled as to others which were actually conveyed to him, and ſhall paſs by a deviſe of his "lands;" as in ſome caſes by a deviſe of "all his free lands," a "portion of tithes" was adjudged to paſs. So in the principal caſe, the word "lands" ſhall extend to all *eſtates* whatſoever: therefore the "rents" which he had purchaſed ſince the making his will ſhall paſs by the deviſe of his "lands." Beſides, the lands for which he had contracted did not 1. Ander. 188.

(*a*) Cro. Eliz. 810. Owen, 132. 2. And. 172. (*b*) Co. Lit. 18.

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all reſt in articles, for great part of the purchaſe-money was paid; but the heir can have no right to ſuch lands if it is not a realty; and if it is a real eſtate, then it may deſcend; but whatever is deſcendible is deviſable, and here it is deviſed by the words "real "eſtate;" and though the time of conveying thoſe lands was not come, yet that will make no alteration of the caſe; for the vendor is, from the time of the contract, deemed a truſtee for the purchaſer.

And as to the *fee-farm rents*, they ſhall be compriſed in a deviſe of his "lands," eſpecially thoſe rents of that nature which iſſued out of his own lands; for the intervening eſtate made to the wife of the teſtator for life was by a deviſe of a rent-charge to her of one thouſand pounds *per annum* for her life; and by her acceptance thereof thoſe rents were merged in the reverſion, and then by a deviſe of "all his lands" the rents will paſs.

As to THE THIRD POINT. As to the teſtator's *copyhold eſtate*, the objection is, that he having declared a truſt concerning his *freehold* and *leaſehold*, and none of his *copyholds*, for they are not ſo much as mentioned, whether a truſt thereof ſhall reſult to the
*[75] * heir at law? And it was argued, that it ſhould not, becauſe there are ſufficient words by which they will paſs, and thoſe are by a deviſe of "all his real eſtate" Beſides, the teſtator never had the legal eſtate in thoſe *copyholds*, but it was others in truſt for him, which truſt he hath deviſed; and the codicil is a republication of the will. Now there are authorities in point to prove, that *copyholds* will paſs by a deviſe of his "real eſtate;" as where *a contract* was made for the purchaſe of lands, ſome of which were copyholds, it was adjudged, that by a deviſe of his "real eſtate, thoſe copyholds would paſs in equity; and this was the caſe of *Woodier v. Greenhill (a)*. And ſo it was held in the caſe of *Davy v. Beardſham (b)*, that copyhold lands would paſs by the deviſe of his lands, if the deviſee claimed them in time.

How a legacy given "in lieu "of *all demands*" ſhall be conſtrued.

There was ANOTHER OBJECTION made in the behalf of the plaintiff as to that clauſe in the codicil where the teſtator directed, that what he had deviſed to his ſiſter in the will ſhould be "in lieu "of all demands ſhe might have out of his eſtate," that this clauſe might be ſatisfied by intending ſuch demands as ſhe may have in her own right. But in anſwer to this objection, it is abſurd to ſay a thing ſhall be *intended* when it is plainly *expreſſed*; and here the words are, "in lieu of all demands;" neither doth the plaintiff pretend to ſhew any particular demands ſhe had to the eſtate, which

(*a*) 2. Vern. 679.—See alſo Precedents in Chancery, 320.

(*b*) The teſtator had agreed for the purchaſe of a copyhold, and purſuant to that agreement a ſurrender was made out of court to his uſe; then he deviſed "all "his lands to *R. B. &c.*" and died before admittance; it was decreed, that the copyhold lands ſhall paſs, becauſe the teſtator had a title in equity to recover them, and the vendor ſtood ſeiſed for him till a legal conveyance could be made. 2. Chan Rep. 39.—NOTE *to former edition.*

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ſhe ought to have done (if ſhe had any) as an inducement to what is thus objected in her behalf.

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ANOTHER OBJECTION was, that the teſtator could not deſign to ſeclude his ſiſter from having any ſhare of his eſtate by thoſe words in the codicil, where he takes notice that the deviſe of her annuity was upon condition ſhe ſhould "releaſe all her right to "his eſtate," becauſe ſhe being a *feme covert*, he very well knew that her releaſe would not bar her. In anſwer to this objection, the word "releaſe" in this place cannot be otherwiſe intended than an effectual releaſe to bar her, which muſt be by fine, and no other releaſe.

If an annuity be given on condition of "releaſing all right to the eſtate," it means a releaſe by fine. 1. Pr. Wms. 783. Poſt. 79.

* [76]

* The teſtator's widow being made a party to the bill, ſhe by her anſwer, and now by her Counſel, inſiſted, that ſhe might have ſome remedy for the rent-charge of a thouſand pounds a-year given to her for life, either by diſtreſs or otherwiſe, for ſhe could have none by the diſpoſition in the will; and that ſhe might have a decree for payment and ſatisfaction thereof, and of the arrears, and that a deduction of the parliamentary taxes might be apportioned to this rent-charge, in proportion to the rents of the lands out of which it iſſues; for that this being a rent-charge out of all the teſtator's lands, it would be in a great meaſure ſwallowed if it ſhould pay more taxes than ſo much, iſſuing out of lands of the value of a thouſand pounds a-year.

Quære, If the court of chancery will give a remedy by diſtreſs, &c. for a rent-charge deviſed to the widow of the teſtator.

THEN HER COUNSEL INSISTED, that ſhe might be quieted in the poſſeſſion of the lands which the teſtator had left her for life; and that ſhe might have the legacy of two hundred pounds left to her by her father's will, with intereſt, to be laid out in what ſhe thought fit, as a remembrance of him, this being a ſeparate legacy, and received by her huſband the teſtator.

Money deviſed to be laid out on a ſpecial truſt carries no intereſt.

But as to this two hundred pounds it was objected, that the teſtator having received it many years paſt, and though for his own uſe and benefit, yet he ſhall not be taken as a debtor, becauſe he had deviſed his plate, jewels, and a legacy of five hundred pounds to her, beſides his coach and horſes; and therefore it ſhall be preſumed ſhe was paid; for according to the ancient rule, *debitor non præſumitur donare*, ſo that her long acquieſcence ſhews her conſent; and if no proof could be made that it was laid (as it really was) in a piece of plate, there is no colour for intereſt to be paid for it, becauſe the property of that plate was in the teſtator whilſt he lived.

Thereupon *Mr. Vernon*, the defendant, conſented to pay the two hundred pounds, but without intereſt.

THEN IT WAS INSISTED *for the widow*, to have *the manuſcripts* as part of the teſtator's houſhold goods, which were deviſed to her; for though the perſonal eſtate is deviſed to truſtees to be ſold to purchaſe lands, yet theſe *manuſcripts* are no part of the perſonal eſtate, for they are not aſſets to pay creditors, therefore ſhall not go

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over to the truſtees; and they cannot be heir-looms, for the reaſon before mentioned.

But the widow and the other defendant *Bowater Vernon* agreed in court to have them publiſhed between them, without any profit to themſelves.

* [77] * Upon the whole matter it was concluded, for the defendant, that if this will ſhould have ſuch a conſtruction as was contended for by the plaintiff, then the teſtator, notwithſtanding all the pains he had taken to ſettle his eſtate, died inteſtate, and all his trouble was in vain; which is inconſiſtent with his character, who was an ornament in this court, where he attended, and who acted in all things with the utmoſt accuracy and exactneſs. But he acted in this as he did in all other caſes, and made ſo good a will, that even artificial reaſoning is hardly able to raiſe the leaſt colour of doubt concerning it; ſo that it is a little ſurpriſing it ſhould bear any manner of conteſt in a court of juſtice and equity.

LASTLY, It hath been ſaid, that the heir at law ſhall not be diſinherited without plain and expreſs words for that purpoſe; but this ſaying is too general. It is true, if the words are doubtful, the heir ſhall be favoured (*a*); but if a man deviſe his lands to one, and in the ſame will deviſe the ſame lands to another, they are *joint-tenants*; which ſhews, that the will is to be conſtrued as one entire clauſe, and not as different clauſes; and by this means contradictions will be avoided in the conſtruction thereof.

THE COURT. The principal queſtion in this caſe is, Whether *the codicil* revoked *the will*, and ſhall be taken as a courſe of different words and phraſes, or as one entire ſcheme conſummate by the ſealing?—And as to that matter, IT WAS HELD to be the beſt way to conſtrue one part thereof with the other, as one entire ſcheme (*b*), and which was thought on and conſidered by the teſtator at one and the ſame time. It is abſurd to ſay, that the *revocation* in the codicil of an immaterial circumſtance in the will ſhall revoke the whole will, for it is no more than a revocation of part of his will, by which he had appointed two perſons to be truſtees, and appointing two other in their room; it is as if a perſon ſhould ſet forth in a codicil, that *T. S.* whom he had appointed to be his executor, ſhould not be his executor; this could never be taken as a revocation of the diſpoſitions in his will. Now here the teſtator by his codicil appointed two others to be truſtees, and he deviſed to them accordingly; this muſt be intended as joint-tenants of the truſt with thoſe already named in the will; for the words "other truſtees" imply ſome not before named (*c*).

* [78] * As to *the lands* for which the teſtator had *contracted*, the owners thereof continue truſtees for the teſtator until conveyances

(*a*) 2. Vern. 340.
(*b*) Latch, 39.
(*c*) See Willett v. Sandford, 1. Vezey, 178. 186.

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are executed *(a)*, and he might compel them to convey accordingly; and therefore they ſhall paſs by this deviſe, though he had bought other lands which were actually conveyed to him; and this was never made a queſtion in this court before: and as for the objection, that what reſts in *articles* was neither *lands* or *money*, this is of no manner of weight, and therefore it deſerves no anſwer *(b)*.

As for the *fee-farm rents*, a deviſe of "lands" is ſufficient to paſs ſuch "rents," or any other right out of lands; and therefore where there is ſuch a deviſe (as in this caſe) they ſhall not deſcend to the heir, eſpecially ſince it appears on the face of this will, that the teſtator had deviſed two hundred pounds a-year to the heir during life; and then in the codicil he takes notice, that his heir had a ſufficient proviſion made for her, and ſays, that it ſhall be all which ſhe ſhall have, and that on condition ſhe ſhould releaſe all farther demands out of his eſtate both real and perſonal.

And this codicil is a good *republication* of his will *(c)*. Now as to *republications*, there is ſome difference between *real eſtates*, which will not paſs without it, and the conſtruction of a deviſe of *perſonal eſtates*, to make them paſs without it, which conſtruction is on the ſtatute of Wills *(d)*, which introduces a new method of conveying eſtates, *viz.* "That any perſon having lands may diſpoſe thereof by will;" and this is founded on the reaſon of the common law, that a man cannot give what he hath not, as the heir in tail cannot grant or releaſe to diſcontinue the eſtate-tail. Now admitting that "rents" will paſs by a deviſe of "lands," yet the teſtator had not thoſe lands to deviſe, becauſe the time of conveying them was not come. It is true, this objection was made, but it is of no weight, becauſe, as hath been obſerved already, the vendors are truſtees for the purchaſer until a conveyance could be made. Beſides, a man's mind may change when he grows rich; and ſince the ſtatute of Frauds, *a republication* muſt be in writing.

(a) See Chapman *v.* Tanner, 1. Vern. 267. Walker *v.* Preſwick, 2. Vezey, 622. Pollexfen *v.* Moor, 3. Atk. 273. Fawell *v.* Helis, Amb. 724. Blackburn *v.* Gregſon, 1. Bro. C. C. 420. Cater *v.* Earl Pembroke, 2. Brown C. C. 284.

(b) If a perſon article to buy certain lands, he thereby becomes ſeiſed thereof in equity, and they will paſs by a *ſubſequent* deviſe of "all his lands of inheritance." Greenhill *v.* Greenhill, Prec. in Ch. 320. S. C. 2. Vern. 679. S. C. 1. Eq. Abr. 174. Green *v.* Smith, 2. Atk. 572. And where a man covenants to lay out a ſum of money in the purchaſe of lands, and deviſes his real eſtate before he has made ſuch purchaſe, the money to be laid out will paſs to the deviſee. See Green *v.* Smith, 1. Atk. 572. Lingen *v.* Sowray, 2. Peer. Wms. 172. Beauclear *v.* Mead, 2. Atk. 169. Oldham *v.* Hughes, 2. Atk. 453. Pullen *v.* Ready, 2. Atk. 590. Guidot *v.* Guidot, 3. Atk. 254. Pulteney *v.* Earl of Darlington, 1. Brown C. C. 224. Raſhleigh *v.* Maſter, 3. Brown C. C. 99. Whitaker *v.* Whitaker, 4. Brown C. C. 31. But where *A.* deviſed "all his real and perſonal "eſtate," and *afterwards* articled to purchaſe lands, and then died, the heir at law was held to be intitled to this eſtate, as not paſſing by the will. Langford *v.* Pitt, 2. Peer. Wms. 629. Allen *v.* Allen, Moſeley, 262. Cotton *v.* Cotton, 2. Ch. Rep. 138.

(c) Powell on Deviſes, 658. 664.

(d) 32. *Hen.* 8. c. 1. and 34. & 35. *Hen.* 8. c. 5.—See alſo 1. Roll. Abr. 617. Dyer, 143. Plowd. 344.

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As to the *copyhold eſtate*, though the teſtator by his will hath declared only a truſt of his *freehold* and *leaſehold* eſtate, ſo that no truſt is raiſed by the will, yet by the codicil he ſhews plainly, that it was his intention to paſs a truſt in them, or to paſs them in truſt.

* [79] * As to *the releaſe*, it is true, it is no conveyance, if nothing paſſed by the will; nor, as this caſe ſtands, is it any conveyance to bar the heir at law of any demand to the teſtator's eſtate, ſhe being a *feme covert*; but he having declared in the codicil, that ſhe ſhall have her annuity on condition ſhe releaſes, &c. this muſt be intended a releaſe by fine, ſo that it may be effectual, otherwiſe ſhe ſhall quit her annuity.

And this will, as to the *perſonal eſtate*, is good and perfect.

THEREFORE IT WAS DECREED, that the original bill ſhould be diſmiſſed with coſts, but the defendant forgave the coſts.

And as to that part of this cauſe which related to the widow of the teſtator, eſpecially as to the two hundred pounds which was deviſed to her by her father to be laid out in ſomething in memory of him, it ought to be paid out of the perſonal eſtate of the teſtator, it being received by him, and for his own benefit, and the rather, becauſe he was executor to her father; and it is a miſbehaviour in him not to perform his will in every reſpect; but it ſhall carry no intereſt, becauſe it was to be laid out in ſomething for his remembrance, which would have been no benefit to her huſband, the teſtator, if laid out in his life-time, becauſe it was not for her ſeparate uſe, but was to be laid on a ſpecial truſt, and to a particular purpoſe (*a*).

And as for the reſt of the widow's demands, the defendant is ready to ſatisfy her as deſired.

Affirmed in the houſe of lords.

(*a*) A legacy for mourning carried intereſt, Swinſen *v.* Scawen, 1. Vezey, 99.; but not for a ſum uncertain, Ferrers *v.* Ferrers, Caſes T. T. 2. But for caſes in which the court of chancery will not allow intereſt, ſee 2. Com. Dig. "Chancery" (3. S.).

HILARY

HILARY TERM,

The Tenth of George the Firſt,

IN

The Year

1724.

IN

The Court of Chancery.

The Earl of Macclesfield, *Lord Chancellor.*

Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

* Hobſon *againſt* Staneer.

Caſe 35.

If a perſon upon his marriage make an extravagant or unreaſonable ſettlement, yet if no fraud or incapacity appear, it ſhall not be avoided by perſons claiming under a ſubſequent marriage ſettlement.

1. Ch. Rep. 40.
2. Vern. 475.
1. Vern. 100.
1. Atk. 625.
2. Com. Dig. "Chancery" (2. T. 15.).

A BILL was exhibited by the plaintiff to be relieved againſt a bond obtained by the defendant, and, as ſuggeſted, without any manner of conſideration; and to have another bond of eighty pounds, conditioned to pay forty pounds, to be delivered up to the plaintiff, the money being paid, and likewiſe to be relieved againſt a ſettlement obtained from him by fraud, without conſideration, he being a weak man.

THE CASE was, That the plaintiff married the daughter of the defendant, who was his firſt wife, upon which marriage the defendant procured a ſettlement from him by fraud, which was by ſettling part of his eſtate to the uſe of himſelf and his ſaid wife, for life, remainder to truſtees to preſerve contingent remainders, remainder to the uſe of *Joſhua Staneer*, and his heirs, who was the eldeſt ſon of the defendant, and brother to the plaintiff's wife, and of other part of his eſtate to truſtees for two hundred years, to pay any money the plaintiff ſhould charge it withal, by way of legacies, or otherwiſe, remainder to another brother of the plaintiff's wife, and to his heirs for ever. But the defendant, his father, took care to have a grant from him of that power which he had to charge the eſtate; and his mother-in-law procured another grant

HOBSON *againſt* STANLEY.

from him of one hundred pounds, to be paid to her after the death of his wife, which was recited to be in conſideration of the love and affection * he had for his wife, who was her daughter; and they obtained another bond of him of eighty pounds, conditioned to pay forty pounds, without any manner of conſideration; therefore he inſiſted, that this ſettlement and both the bonds ought to be ſet aſide; and a ſecond ſettlement which he made on his now wife, upon his ſecond marriage, and in conſideration of her portion, might be eſtabliſhed and made good.

* [81]

The defendant anſwered, that the plaintiff having married his daughter without his privity or conſent, he was at firſt very much diſpleaſed, but afterwards was reconciled, and took him and his wife into his houſe, and paid ſome of his (the plaintiff's) debts, and had done other ſervices and kindneſſes for him and his wife, ſo that he (the plaintiff) was indebted to the defendant in the ſum of one hundred pounds and more; and that in conſideration thereof, and of the love and affection which he did bear to his wife (*a*), who was now dead, he made the ſaid ſettlement, which he inſiſted on to be good, and not to be ſet aſide (*b*).

The ſingle queſtion upon the proofs was, Whether this ſettlement ſhall be ſet aſide, either for want of capacity in the plaintiff, or for that it was a voluntary ſettlement (*c*)?

And as to that IT WAS ARGUED *for the defendant*, that the witneſſes for the plaintiff had not ſhewn one ſingle inſtance of his weakneſs, but generally, that he was a weak man; when the witneſſes produced by the defendant prove, that he was a perſon ſufficient to manage his own buſineſs and eſtate; and certainly it is not neceſſary, that every man who makes a ſettlement ſhould be an ingenious or a learned man, for it is ſufficient if he is of an ordinary capacity; therefore this ſettlement ought not to be ſet aſide for any *incapacity* in the plaintiff.

Neither ought it to be ſet aſide as a *voluntary ſettlement* to make room for another upon the plaintiff's ſecond marriage, becauſe the ſecond ſettlement was obtained upon no better conſideration than the firſt (*d*), which was had without any manner of fraud or circumvention; and ſo far from it, that it was proved the plaintiff always intended, if he had no iſſue, that his eſtate ſhould go to the relations of his wife; and that ſuch his intent continued even after the death of his wife.

(*a*) Stiles *v.* Attorney General, 2. Atk. 152.

(*b*) That equity will not carry an agreement into execution without a valuable or meritorious conſideration, ſee Colmay *v.* Sorrell, 3. Brown's C. C. 12.

(*c*) See Goodwin *v.* Goodwin, 1. Ch. Rep. 173. Villers *v.* Bramont, 1. Vern. 100. Clavering *v.* Clavering, 2. Vern. 473. Taylor *v.* Jones, 2. Atk. 601. Watſon *v.* Routledge, Cowp. 705.

(*d*) Allen *v.* Arme, 1. Vern. 365. Clavering *v.* Clavering, 2. Vern. 473. Young *v.* Cottle, 1. Peer. Wms. 102. Hawes *v.* Wyatt, 3. Brown C. C. 156.

But

But if the Court ſhould be of opinion, that this is a voluntary ſettlement, yet the bill ought to be diſmiſſed for want of proper parties, becauſe *Robert Hobſon*, the plaintiff's father, who had the legal eſtate by the laſt ſettlement, is not made a party; beſides, the plaintiff ſhall not have any * remedy to ſet aſide the firſt, and to ſet up the laſt ſettlement, becauſe he has the ſame eſtate in both; therefore he can have no pretence to complain in a court of equity for relief againſt one ſettlement in favour of another; ſuch an application as this ought to be made by him who is aggrieved, and who hath an eſtate by one ſettlement and none by the other.

* [82]

Therefore it was inſiſted, that the firſt ſettlement was made on a good conſideration, for what can be better than marriage? and the remainders limited on the ſame conſideration are good.

As for the bond of eighty pounds, the defendant inſiſts, that he paid the money for the plaintiff's uſe at two payments, &c.

ON THE OTHER SIDE *it was argued*, that this was a very extravagant ſettlement; in the firſt place, becauſe there was no manner of proviſion for the iſſue of that marriage; and though there was an eſtate limited to truſtees to preſerve contingent remainders, yet there are no remainders in the ſettlement; but the inheritance of all his (the plaintiff's) lands is ſettled on *Joſhua Staneer*, his wife's brother; and in conſideration of love to his wife; for after the limitation to him (the plaintiff) and his wife for life, the remainder in fee of part of the eſtate is immediately limited to one of her brothers, and the fee of the other part of the eſtate is limited to another of her brothers, with an intermediate term of years to truſtees, which the plaintiff might charge; but care was taken to have a grant of that power which the plaintiff had to charge the lands, from the plaintiff to that brother, ſo that after all events he might be in as good a condition as his elder brother.

Beſides, this eſtate being no more than fifty pounds a-year, and the plaintiff but tenant for life, there are other incumbrances ſet up by the defendant, *viz.* a grant of one hundred pounds to the defendant's wife at five pounds *per cent.* during her life, and the bond of eighty pounds, which is impoſſible for him to pay, having only an eſtate for life in ſuch a ſmall eſtate; and this ſhews an apparent fraud on the face of the deed itſelf; and by this means the defendant will always have the plaintiff in his power to get any other writing from him to charge his eſtate.

As to the objection, that this ſecond ſettlement was made upon no better a conſideration than the firſt, the fact is quite otherwiſe, for it was made not only in conſideration of marriage, but of one hundred pounds, which the plaintiff actually received as a marriage-portion with his wife.

* But upon reading the ſettlement, it appeared to be thus: * [83]

The eſtate was limited to *Robert Hobſon* the father of the plaintiff, his heirs and aſſigns, during the lives of the plaintiff and his wife,

Hobson *againſt* Stanzer.

in truſt that he might employ the profits for the maintenance of the ſaid plaintiff and his wife during their lives, with remainders to the iſſue of that marriage with other remainders over, ſo that the plaintiff had no eſtate by this ſecond ſettlement.

The Court. The plaintiff has no reaſon to complain, becauſe it appears he is in a better condition by the firſt ſettlement than by the laſt, for he has an eſtate for life by the firſt, and none by the laſt. And there being no fraud proved in obtaining the firſt ſettlement, nor any manner of proof of the plaintiff's incapacity, there can be no reaſon to ſet aſide the firſt ſettlement.

But *Robert Hobſon*, the plaintiff's father, who had the legal eſtate by the ſecond ſettlement, not being made a party to the bill, the plaintiff could have no decree, but had leave to amend his bill, &c.

Caſe 36. Evans *againſt* Hoſkins, and the City of Glouceſter.

If a leaſe for years, worth 200l. a-year, belong to two coparceners, and one of them, upon a falſe ſuggeſtion that a fine of 250l. was to be paid for the renewal of it, obtain an aſſignment of the other's moiety for a conſideration of 20l. equity will ſet aſide this conveyance as fraudulent, and order the aſſignee to account for a moiety of the profits.

* [84]

S. C. 2. Eq. Abr. 88.
Ante. 80.
1. Vern. 206.
2. Vern. 307.
1. Atk. 409.
2. Atk. 254.
2. Brown C. C. 150.
2. Com. Dig. "Chancery" (4 K 11.).

Lady Joan Cook, by licence from *King Henry the Eighth*, granted the lands in queſtion to the mayor and burgeſſes of *Glouceſter*, in truſt that whenever the leaſe made by her to one *Partridge* and *Anne* his wife ſhould be determined, they would make a new leaſe to them, or to the heirs of the ſaid *Anne* at any time on requeſt, on payment of twenty marks, and under the yearly rent of twenty marks for the ſpace of thirty-one years, and with ſuch clauſes and conditions as in the old leaſe; and that upon the expiration of ſuch leaſe of thirty-one years, the defendants, the mayor and burgeſſes of *Glouceſter*, ſhould at any time, on the requeſt of the heirs of the ſaid *Anne*, make a new leaſe to them in manner as aforeſaid.

The plaintiff *Evans*, and one *Holeman Hoſkins*, who was the father of the defendant *Hoſkins*, were coheirs of the ſaid *Anne Partridge*, and he the ſaid *Holeman Hoſkins*, in the year 1712, got an aſſignment from the ſaid *Evans* of his right without any manner of conſideration; therefore this bill was brought againſt the defendant *Hoſkins*, the ſon of the ſaid *Holeman Hoſkins*, to ſet aſide the ſaid aſſignment as obtained by fraud and impoſition on the plaintiff *Evans*, by miſinforming * him of the ſtate of his right, and againſt the other defendants, the mayor and burgeſſes of *Glouceſter*, to have a leaſe made to the plaintiff *Evans*, and to the defendant *Hoſkins*, as coheirs to the ſaid *Anne Partridge*, and according to the covenants in the original leaſe granted by the *Lady Cook* to the mayor and burgeſſes of *Glouceſter*.

The defendants by their anſwer acknowledge, that the plaintiff and the defendant *Hoſkins* are coheirs to the ſaid *Anne Partridge*, and that the *Lady Cook* made ſuch a grant to the mayor and burgeſſes of *Glouceſter* as in the bill is ſet forth, and that leaſes have ſince been made of thoſe lands, purſuant to the covenants in the original leaſe. But that in the year 1712, the plaintiff *Evans*, in conſideration

conſideration of eighty pounds paid to him by *Holeman Hoſkins*, the defendant *Hoſkins's* father, aſſigned all his right in the leaſe to him the ſaid *Holeman Hoſkins*; and by another deed covenanted that the ſaid *Holeman Hoſkins* might make uſe of his (the plaintiff's) name in taking a new leaſe of the city, &c. and that his name might be put in the ſaid new leaſe, in truſt for the defendant *Hoſkins*; and that on producing the ſaid deed, the city made a new leaſe to the ſaid *Holeman Hoſkins*, without naming the plaintiff, but denies any fraud in obtaining the ſaid leaſe.

The mayor and burgeſſes of *Glouceſter* likewiſe own the pedigree, the grant, and the truſt, as ſet forth in the bill; and that on ſhewing them AN ASSIGNMENT, made by the plaintiff *Evans*, of all his right, they made a new leaſe to the ſaid *Holeman Hoſkins*, according to the covenants in the original leaſe.

This being the caſe, THOSE WHO ARGUED *for the plaintiff* inſiſted, that leaſes had been made from time to time according to the covenants and clauſes in the original leaſe, and that the laſt leaſe granted to *Holeman Hoſkins* was in the year 1690, and that the ſaid *Holeman* in the year 1712, made application to the plaintiff *Evans*, who was a ſtranger to this covenant, and informed him, that the city inſiſted on two hundred and fifty pounds fine, and on a conſiderable advancement of the rent; whereupon the plaintiff *Evans* being thus miſinformed, and not knowing but the leaſe in being would ſoon expire, executed this aſſignment in conſideration of twenty pounds to him paid by the ſaid *Holeman Hoſkins*, and no more. It is true, the defendant *Hoſkins*, who is executor of the ſaid *Holeman Hoſkins*, pretends that this aſſignment was made in conſideration of eighty pounds paid to the plaintiff *Evans*, which * he denies: but admitting it was ſo, it is a very ſmall conſideration for the purchaſe of ſuch a leaſe, the lands being worth above two hundred pounds a-year; beſides, at the time of this aſſignment, there were twelve years of the old leaſe unexpired; ſo that a fraud appears upon the very face of the deed itſelf (*a*). Therefore it was inſiſted, that the ſaid aſſignment ſhould be ſet aſide, and a new leaſe decreed to the plaintiff *Evans*; and that the defendant, as executor to *Holeman Hoſkins*, may account to the plaintiff for the profits of the leaſe received by his father *Holeman Hoſkins* in his life-time, and by him the defendant ſince his father's death.

* [85]

On reading the proofs, it appeared, that there was no more than twenty pounds paid to the plaintiff as a conſideration of his aſſigning his right in the leaſe to the ſaid *Holeman Hoſkins*; and that the benefit thereof was worth more to him than two hundred pounds a-year, and that twelve years of the old leaſe were unexpired at the time when he (the plaintiff) executed this aſſignment; and it

(*a*) Cory *v.* Cory, 1. Vezey, 19. Oldin *v.* Sambourne, 2. Atk. 15. Young *v.* Peachey, 2. Atk. 255. Kinchant *v.* Kinchant, 1. Brown C. C. 369. 374. Evans *v.* Llwllyn, 2. Brown C. C. 150.

appeared

EVANS against HOSKINS AND THE CITY OF GLOUCESTER.

appeared by a letter which was proved to be written by the ſaid *Holeman Hoſkins*, purporting that he and the plaintiff were to pay two hundred and fifty pounds to the city, for a fine on renewing the leaſe, when they were to pay only twenty marks, and no more.

And all that the defendant proved was, that the lands were not of ſo great a value at the time of the aſſignment as they were now, and that the city inſiſted on one hundred and fifty pounds for a fine: which is very true; but the reaſon was, becauſe *Holeman Hoſkins* would have a leaſe made to him excluſive of the plaintiff *Evans*.

Whereupon THE COURT decreed, that this aſſignment ſhould be ſet aſide, and a new leaſe to be made to the plaintiff, and to the heirs of *Holeman Hoſkins*, according to the covenant in the original indenture made between the *Lady Joan Cook* and the city of *Glouceſter*: and that the defendant, the executor of *Holeman Hoſkins*, ſhall account for a moiety of the profits during the ſaid *Holeman's* life, and ſince his death, and ſhall pay the coſts of this ſuit.

* [86]

Caſe 37.

* Hoſier *againſt* Read.

Where an agreement by parol, but confeſſed in the anſwer, ſhall be executed, though not in writing.

Eq. Abr. 19. 2. Com. Dig. "Chancery" (2. C. 4.). 2. Bro. C. R. 559.

THE PLAINTIFF exhibited this bill to have the defendant execute ſuch a leaſe as the Court ſhould direct.

The caſe, upon the pleadings, was thus:

There was an agreement in writing executed between the plaintiff and the defendant, by which the defendant was obliged to take a leaſe of a farm of the plaintiff for nine years, at the yearly rent of one hundred and forty pounds, and at the time of executing the ſaid agreement, the defendant averred, that he had a leaſe of the great tithes of the pariſh of *Calverton*, and promiſed to manure this farm with the ſtraw of the ſaid tithes when made into dung; that by virtue of this agreement, the defendant entered and ploughed ſome paſture ground, and grubbed up ſome buſhes contrary to the ſaid agreement; for which ploughing and grubbing the plaintiff demands ſatisfaction, and that the defendant might execute a leaſe according to the ſaid agreement (*a*): That there was a meeting between them to execute a leaſe, but then the defendant inſiſted upon ſome extraordinary conditions not in the written agreement; and that what chiefly induced the plaintiff to enter into this agreement, was the promiſe of the defendant to manure the lands with the ſtraw as aforeſaid.

(*a*) That where a man takes poſſeſſion in purſuance of an agreement, the Court will decree execution of it, ſee Clerk *v.* Wright, 1. Atk. 12. Earl of Aylesbury's Caſe, Stra. 783. Lacon *v.* Mertins, 3. Atk. 4. Butcher *v.* Stapeley, 1. Vern. 363. Lockey *v.* Lockey, Prec. Ch. 519. Walker *v.* Walker, 2. Atk. 100. Gunter *v.* Halſey, Amb. 586. Whitbread *v.* Brockhurſt, 1. Brown C. C. 404. 417.

The

Hoskar against Read.

The defendant by his anſwer confeſſed, that he agreed to take a leaſe of this farm, by which agreement the plaintiff was to repair the houſe, and outhouſes, and to build a new dairy-houſe, and to ſink a well; and that the defendant was to have liberty to plough up ſome cloſes, and to grub buſhes in others, which was in conſideration of ten pounds a-year advance of rent; and that according to this agreement, he is willing and ready to execute a leaſe, and ſays that the written agreement on which the plaintiff inſiſts is no more than a memorandum drawn by an attorney, and that the defendant had agreed to take a leaſe of the farm for ſuch a term, and under ſuch a rent, that the plaintiff agreed to let the defendant have the poſſeſſion, for that *Lady-day* was near at hand, and until he, the plaintiff, ſhould be ſatisfied that a clauſe in the leaſe, on which the defendant inſiſted, was uſual to be inſerted in leaſes there, which clauſe was, that the defendant was to covenant to leave the premiſes in good repair, the accidents by fire and tempeſt only excepted, and unleſs that * clauſe was inſerted in the leaſe, the defendant refuſed to ſign it. * [87]

But the plaintiff inſiſting to have a leaſe executed according to the agreement in writing, and the defendant refuſing it for the reaſon before mentioned, the plaintiff exhibited his bill to enforce the execution of ſuch leaſe.

Thereupon the defendant exhibited a croſs-bill, in which he ſet forth the agreement at large, as before in his anſwer to the original bill, and inſiſted, that the plaintiff might execute a leaſe according to that agreement, which he was ready to execute on his part.

To which croſs-bill the plaintiff made anſwer, by which he confeſſed, that by the firſt agreement he was to put the houſes in repair, and to make a new dairy, and to ſink a well; but that all this was to be done upon a ſuppoſition that the now plaintiff had a leaſe of the ſaid tithes, as he affirmed, and would manure the farm with the ſtraw thereof; but denies that the plaintiff had any leave to grub up buſhes in conſideration of advance of rent, for that ten pounds a-year advance is no manner of conſideration, the farm being very well worth one hundred and forty pounds, and ſo much the former tenant paid; but inſiſts on a leaſe in purſuance of the *written agreement*; and that there was no clauſe therein by which liberty was given to grub any buſhes in conſideration of advance of rent.

There were two queſtions upon theſe bills, anſwers, and proofs,

THE FIRST was, If the plaintiff in the original bill ſhall have a leaſe according to the written agreement, or memorandum in writing?

SECONDLY, If he ſhall be obliged to execute a leaſe to the defendant, according to the agreement ſet forth in the anſwer to the croſs-bill, which was not in writing, that being loſt?

HOSIER *against* READ.

As to this matter, the caſe is thus:

One *Thompſon*, an attorney, drew ſome heads of an agreement between the plaintiff and the defendant, which heads were now loſt; but this attorney, who was choſen by both parties, made oath, that the purport of them was according to the agreement ſet forth in the anſwers, both to the original and croſs-bills; and that in the leaſe of the former tenant there was a clauſe to repair, but fire and tempeſt were excepted, and that it is an uſual exception in leaſes there.

[88] * It was likewiſe in proof, that when the parties met to execute a leaſe, there was no objection made by the plaintiff but only to that exception, and that the written agreement was no more than a memorandum, that the defendant being likely to be out of the farm he then held, and *Lady-day* coming on, it was thought convenient he ſhould have ſome place to enter with his ſtock till the plaintiff ſhould be ſatisfied whether ſuch a clauſe was uſual in leaſes.

It is true, this memorandum refers to the firſt agreement, but the plaintiff in his anſwer to the croſs-bill confeſſes, that he agreed to moſt of the clauſes, but that it was upon other conſiderations, as he would now inſinuate.

In the caſe of *Jones v. Sheriffe*, there were heads of an intended leaſe taken by an attorney in writing; but upon proof that ſome other clauſes were agreed on between the parties at the ſame time, this Court decreed, that thoſe clauſes ſhould be put into the leaſe, notwithſtanding the Counſel on the other ſide ſtrenuouſly inſiſted on the ſtatute of Frauds.

So in caſe of abſolute mortgages (which was the old way of mortgaging eſtates) with a promiſe by the mortgagee to make a defeaſance, which he afterwards denied to make, and inſiſted, that ſince the ſtatute of Frauds, 29. *Car.* 2. c. 3. he was not obliged to do, becauſe not in writing; but on the hardſhip of the caſe, and on the fraud, the Court decreed a defeaſance.

ON THE OTHER SIDE *it was argued*, that it would be of dangerous conſequence to admit this parol and pretended agreement to be given in evidence directly againſt this written agreement; this is a thing which could not be done before the ſtatute of Frauds, much leſs ſince that ſtatute was made (*a*). Beſides, this parol agreement is inconſiſtent in its very nature, it being for leave to cut buſhes in a country where fuel is very ſcarce, and where many young oaks are preſerved by thoſe buſhes whilſt growing; and therefore it was inſiſted to have a leaſe executed according to the written agreement.

(*a*) Partridge *v.* Powlet, 2. Atk. 383. Lake *v.* Phillips, 1. Ch. Rep. 110. Ireham *v.* Child, 1. Brown C. C. 92. Patmore *v.* Morris, 2. Brown C. C. 219. Hare *v.* Sherwood, 3. Brown C. C. 168. Jordan *v.* Sawkins, 3. Brown C. C. 388.

The

The agreement being in writing, THE COURT was of opinion not to make any decree againſt it upon a parol agreement (*a*). Hosier *againſt* Read.

But THE COUNSEL *for the defendant* inſiſting, that it did not ſtand on the foot of a parol agreement, becauſe it was confeſſed in the anſwer to the croſs-bill (*b*); and it being fully proved by the attorney who drew it, and no objections being * made to it but as aforeſaid; * [89]

THE COURT, upon the reading the proof of the ſecond writing or memorandum, and finding it referred to the firſt agreement, diſmiſſed both the bills, but without coſts.

(*a*) 2. Chan. Caſes, 142. (*b*) But ſee Whitchurch *v.* Bevis, 2. Brown C. C. 559.

Scurry and his Wife *againſt* Morſe.

Caſe 38.

THIS was a bill brought by the plaintiff and his wife, who was the widow of *Henry Bodily*, to have an account of the perſonal eſtate of the ſaid *Henry*, and to be repaid ſome coſts the defendant put them unto, by unneceſſary ſuits at law.

A perſon cannot bring a bill in equity for an account againſt one co-executor only, either as a *creditor* or *as reſiduary legatee.*

S. C. 2. Eq. Abr. 168. 252. 2. Peer. Wms. 308. Co. Lit. 113. *note.* 3. Peer. Wms. 33. 331. Mitford Pleadings, 144. 246. 220.

The bill ſets forth, that the plaintiff *Scurry* was executrix of the ſaid *Henry Bodily*, her firſt huſband, who likewiſe conſtituted the defendant *Morſe*, and another, as co-executors in truſt for his widow, the now plaintiff, in order to aſſiſt her to recover the perſonal eſtate; but that the defendant *Morſe* now inſiſts to act as executor alone; and farther, that the teſtator, *Henry Bodily*, her firſt huſband, ſued the executors of *Henry Bodily* the elder, but died before the ſaid ſuit was ended; and thereupon this defendant *Morſe* proſecuted that ſuit to an account before A MASTER, but then releaſed it; and therefore the plaintiffs now inſiſt, that the defendant ſhall account (*a*), or that the account taken before the maſter may be inſpected.

The defendant by his anſwer ſays, that he hath done nothing but as executor to the teſtator *Henry Bodily*, and in truſt for his children, and that this ſuit ought not to be carried on againſt him alone, who is but one of the three co-executors, ſo that there are not proper parties before the Court.

IT WAS ARGUED *for the plaintiff*, that though there were three co-executors, yet the plaintiff might releaſe one, and demand an account againſt the other of ſuch part of the teſtator's goods as came to his hands, which demand was now made of the defendant, who was only a truſtee for the plaintiff.

THE COURT was of opinion, that the plaintiffs could not ſue, as creditors, one executor without the other, nor as reſiduary legatee.

So the bill was diſmiſſed for want of proper parties (*c*).

(*a*) 2. Eq. Abr. 6.
(*c*) See Aſhhurſt *v.* Eyre, 2. Atk. 50. S. C. 3. Atk. 342. Plunket *v.* Pynſon, 2. Atk. 51.

Dawſon

Caſe 39.

* Dawſon *againſt* Chater.

The court of chancery will not make a decree on a bill for a legacy by a *deviſee* againſt *an heir at law*, who controverts the validity of the will, until after an action at law.

AN ESTATE was deviſed to *T. P.* who exhibited this bill againſt the heir at law, to have the poſſeſſion thereof according to the will of the teſtator.

The defendant, by his anſwer, denied the making any ſuch will as in the bill is ſet forth; but that if any ſuch was made, it was obtained by the plaintiff by circumvention and fraud, when the teſtator was *in extremis*, and not of a ſufficient capacity, or diſpoſing memory.

S. C. 2. Eq. Abr. 400. 10. Mod. 15. 2. Com. Dig. "Chancery" (X.).

THE COURT was of opinion, that it would be to no purpoſe to proceed in the hearing this cauſe, for that it was a poſitive rule, that where there is any doubt on the proofs, a will ſhall not be eſtabliſhed againſt an heir without a trial at law; therefore if a decree ſhould be made againſt the heir, it would be reverſed in the houſe of lords for that reaſon. As to this matter *Lord Montacue's Caſe (a)* is full in point, to whom very great legacies were given, and he was made ſole executor of the will, which he proved in *Doctors Commons*, and received the legacies; but afterwards exhibited a bill in this court as heir at law to the teſtator againſt the defendants, to whom the eſtate was deviſed; ſuggeſting that he (the teſtator) was *non compos mentis* at the time of making the will. And LORD COWPER, who was then Chancellor, conſidering this will was conteſted by him who ſwore to the truth thereof, and profited under it, decreed againſt him:

But the decree was reverſed in the houſe of lords; where IT WAS RESOLVED, that no decree againſt an heir at law ſhall eſtabliſh a will without a trial at law, if the heir inſiſts on it, eſpecially where there are any lands deviſed (*b*).

(*a*) 6. Bro. P. C. 232.

(*b*) Reſolved accordingly in the caſe of Cook *v.* Parſons, 6 *February*, 13. *Will.* 3. 2. Com. Dig. 316. See the trial at law in this caſe, 10. Mod. 15.

* [91]

Caſe 40.

Hack *againſt* Leonard.

If a leſſor recover poſſeſſion at Law, on a breach of covenant for non repair, equity will relieve the leſſee on his paying the damages occaſioned by not repairing, although the leaſe was conditioned to be void on non-performance of the covenants.—S. C. 2. Eq. Abr. 161. Ante, 22. Poſt. 113. 3. Ch. Rep. 54. 135. 1. Vern. 83. 450. 456. Ch. Caſes, 144. 1. Ch. Rep. 170. 161. 2. Vern. 222. 594. 2. Vent. 352. 2. Peer. Wms. 424. 2. Com. Dig. "Chancery" (2. Q. 3.). 4. Vin. Abr. 406. pl. 31. 2. Atk. 238.

A BILL was brought againſt *an adminiſtrator* to have a new leaſe granted for the reſidue of the term granted by the inteſtate.

THE CASE was thus:—An ejectment was brought by the inteſtate, upon a leaſe for years made by him to the leſſee, rendering rent, with a clauſe of re-entry for non-payment of the rent, and for non-performance of the covenants, which on the part * of the

leſſee

leſſee were to be paid and performed, and the breach was aſſigned generally for non-performance of the covenants in the leaſe. Thereupon the agent for the leſſee aſked the leſſor what rent was due to him, and that it ſhould be paid; who replied, he would not trouble himſelf about the rent, but would ſet aſide the leaſe. The defendant being prepared to prove a tender of the rent, pleaded performance generally; upon which they were at iſſue; and at the trial, the defendant offering to prove the tender, the plaintiff did not inſiſt upon the non-payment of rent, but proved a breach of covenant for not keeping a barn well thatched. Thereupon the plaintiff had a verdict, and the defendant was turned out of poſſeſſion, and ſoon afterwards the plaintiff died inteſtate.

And now this bill was exhibited againſt his adminiſtrator to be relieved againſt the ſaid verdict, and to have a new leaſe granted to the plaintiff for ſo much of the term of the firſt leaſe which was not expired.

THE COURT. If a bond had been given for the performance of covenants in this leaſe, and had been afterwards put in ſuit, this Court could not grant any relief againſt it (*a*).

But THE LORD CHANCELLOR ſaid, he could not apprehend what damage the adminiſtrator could ſuſtain, if the leſſee ſuffered the buildings to be out of repair, ſo as he kept the main timber from being rotten, and left all in good repair before the end of the term.

Therefore it was referred to A MASTER to ſee what damage was done, if any, for non-performance of covenants, and at what time, &c. (*b*).

(*a*) Wafer *v.* Mocatto, poſt. 113. Ray *v.* Duke of Beaufort, 2. Atk. 190. Benſon *v.* Gibſon, 3. Atk. 395. Sloman *v.* Walter, 1. Brown C. C. 418.

(*b*) See Taylor *v.* Knight, 4. Vin. Abr. 406, 407.

EASTER

EASTER TERM,

The Tenth of George the Firſt,

IN

The Year

1724,

IN

The Court of Chancery.

Caſe 41.

* Carpenter *againſt* Chapman.

Friday, 24 April.

Deviſe by a father to his two daughters, carries a fee-ſimple.

LANDS were deviſed by a father to his two daughters to augment their portions.

The queſtion was, What eſtate the daughters ſhould have in the lands ſo deviſed?

1. Roll. Abr. 834. Moor, 57. Carter, 232. 6. Mod. 110. Stra. 798. 2. Atk. 72.

Thoſe who argued, that they had not the inheritance, relied upon a caſe in 1. *Roll. Abr.* 833. where the father deviſed his eſtate to his ſon and daughter "equally to be divided (*a*)," and it was adjudged an eſtate for life only in the daughter, there being no words either in that will or this to paſs the inheritance.

PARKER, *Lord Chancellor*, decreed, that the daughters took the inheritance; for no other eſtate could be eſteemed in augmentation of their portions (*b*); as a deviſe of land to *J. S.* "paying "ten pounds," carries a fee-ſimple (*c*), though ten pounds is not the hundredth part of the value of the land; and the reaſon is, becauſe otherwiſe the deviſee might be a loſer; as if he paid the ten pounds and died immediately after: ſo if a man deviſe a thouſand

(*a*) Moor, 594. 1. Vern. 65. 2. Bl. Rep. 1215. 3. Com. Dig. "Deviſe" (N. 7.).

(*b*) Wright *v.* Pearſon, Amb. 362. Villers *v.* Villers, 2. Atk. 72. Gibſon *v.* Mountfort, 1. Vezey, 491. S. C. Amb. 93. Bagſhaw *v.* Spencer, 2. Atk. 578. Oates *v.* Markham, 3. Burr. 1684.

(*c*) 2. Mod. 25. 2. Vern. 106. Cro. Eliz. 204. Cro. Jac. 591. 599. 3. Com. Dig. "Deviſe" (N. 4.).

CARPENTER *againſt* CHAPMAN.

pounds to be laid out in a purchaſe of lands to be ſettled on his ſon, his ſon will be intitled to the fee-ſimple of thoſe lands, as has been lately decreed.

* [93]

Caſe 42.

* Burdett *againſt* Young.

If a deviſe be "to my "wife all my "perſonal eſtate "of what na- "ture or kind "the ſame may "be, to her ſole "uſe during her "natural life. "ITEM, I be- "queath to my "grandſon *A.* "and my grand- "daughter *B.* "one thouſand "pounds a- "piece, if they "attain the age "of twenty-one "or ſhall be "married, but "if they die be- "fore that age, "then, &c" the grand-children, although they attain the age of twenty-one and marry, are not intitled to the thouſand pounds a-piece until after the death of the teſtator's wife.

THOMAS SUTTON by his laſt will deviſed all his real eſtate (which was one hundred and thirty-five pounds a-year) to his wife for life, and after her death to two truſtees to charitable uſes; then he gave the uſe of all his perſonal eſtate whatſoever to his wife for life; then gave two thouſand pounds to his two grand-children, to each one thouſand pounds, payable at their age of twenty-one, or day of marriage; and if they died before ſuch age or marriage, to charitable uſes. Then he gave four pounds to his ſervants; ten pounds for mourning to ſeveral perſons; two guineas for a funeral ſermon; and directed a hundred pounds to be expended in his funeral and tomb-ſtone, and by a ſubſequent clauſe diſpoſed of ſome of his houſhold goods after his wife's death (*a*).

He died; and the complainant, one of his grand-children, being arrived to the age of twenty-one, brought his bill againſt the wife to compel an immediate payment of his part of the two thouſand pounds legacy.

The queſtion was, Whether the two thouſand pounds legacy is payable at the age of twenty-one, or marriage; or, Whether the wife ſhall enjoy it for her life?

TALBOT *for the plaintiff.*

ROBINS *for the defendant.*

The defendant inſiſted by her anſwer, that *Thomas Sutton*, the teſtator, was a freeman of the city of *London*, and could diſpoſe a moiety only of his eſtate, and no more (*b*); and that the other moiety thereof belonged to her (this defendant) by virtue of the cuſtom of *London*, and likewiſe her *paraphernalia*; and ſhe inſiſts likewiſe, that the teſtator having deviſed to the plaintiff ſeveral ſpecific legacies to be paid after her death, and having deviſed his perſonal eſtate to her, that this thouſand pounds ought not to be paid during her life, nor any ſecurity to be given for the houſhold goods.

S. C. 8. Viner, 284. 403. 418. S. C. 2. Eq. Ab. 557. 560. S. C. 3. Bro. P. C. 45. Poſt. 254. Dyer, 59. 2. Vent 342. 366. 2. Vern. 395. 1. Ch. Rep. 112. Skin. 147. 2. Com. Dig. "Chancery" (3. Y. 8.). 2. Brown C. C. 305.

At the hearing this cauſe, there was no other proof to ſhew, that *Thomas Sutton*, the teſtator, was a freeman of *London*, but

(*a*) See the will more at large, 3. Brown P. C. 45.

(*b*) See 11. *Geo.* 1. c. 18. ſ. 17. ante, page . *notis.*

that

that one *Thomas Sutton* was admitted to his freedom in ſuch a year, but it did not appear to be the ſame perſon (*a*).

Then the different penning this will as to the ſpecific legacies, and this thouſand pounds, ſhew, that the teſtator intended the thouſand pounds ſhould be paid immediately, and not wait until the death of the defendant: the words of the will were, "ITEM, I give all "my perſonal eſtate to my wife, and to both my grandchildren a "thouſand pounds a-piece, if they arrive at the age of twenty-one "years, or marriage;" which laſt clauſe controls the firſt deviſe of the perſonal eſtate to the defendant, and makes the ſubſequent diſpoſition of the thouſand pounds a-piece to his grand-children good; ſo that theſe legacies ought to be paid immediately after the contingency happened, and likewiſe ſecurity ought to be given immediately for thoſe ſpecific legacies which are to be paid after the defendant's death.

PARKER, *Lord Chancellor*. The queſtion is, Whether the deviſe to the wife is to be conſidered as an abſolute deviſe of the whole perſonal eſtate, or only of ſo much thereof as ſhould remain undiſpoſed of? All the deviſes muſt either take effect immediately, or wait until the wife's deceaſe; there can be no difference in the conſtruction of them. The conſtruction of the words, "all my "perſonal eſtate," has always been limited and confined to ſuch part only as ſhall not be otherwiſe diſpoſed of; it is an abſurd interpretation of the intent of the deviſor to ſuppoſe that he intended the deviſes of ten pounds mourning, &c. ſhould expect his wife's deceaſe. This deviſe therefore of the two thouſand pounds is a preſent deviſe (*b*); and payable as the children attain their ages of twenty-one years, or day of marriage:

Wherefore he made a decree accordingly.

(*a*) On the 3d *November* 1722, PRICE, *Baron*, before whom this cauſe came on in the abſence of the Chancellor, was of opinion, that the ſaid entry was not a ſufficient evidence to prove the ſaid *Thomas Sutton* to have been a freeman of the city of *London*, without proving at the ſame time the identity of the perſon, and that the ſaid *Thomas Sutton*, the teſtator, was the ſame *Thomas Sutton* who was meant and intended by the ſaid entry; and therefore made no decree in relation thereto; but the defendant conceiving herſelf aggrieved in regard that the ſaid entry in the chamberlain of *London*'s book was ſufficient evidence to prove the freedom of the ſaid *Thomas Sutton*, preferred a petition of appeal to LORD MACCLESFIELD, *Chancellor*, who made a decree variant from that of PRICE, *Baron*, but without noticing this point of the caſe; and on an appeal to the houſe of lords it was contended, that the entry in the chamberlain of *London*'s book was ſufficient evidence to prove the freedom, and as there was no diſpute concerning the identity of the perſon meant and intended by that entry, the ſame ought not to have been made a queſtion by the Court; or at leaſt it was a ſufficient foundation for the Court to have directed an iſſue to try the fact, in which any defect, in point of proof, might have been ſupplied as to the circumſtances of the identity; or the ſame might have been directed to be inquired into by the maſter. But the decree made by *Mr. Baron* PRICE was fully eſtabliſhed. S. C. 3. Brown P. C. 49.

(*b*) See Clobberie's Caſe, 2. Vent. 342. 366. S. C. 1. Eq. Abr. 294, 295. Adams *v.* Clerk, poſt. 154. Bateman *v.* Roach, poſt. 104. Dame Latimer's Caſe, Dyer, 59. b. Yates *v.* Fettyplace, 2. Vern. 416. Franklyn *v.* Green, 2. Vern. 137. Collins *v.* Metcalf, 1. Vern. 462. Green *v.* Pigott, 1. Brown C. C. 103. Walcot *v.* Hall, 2. Brown C. C. 306.

BURDETT *againſt* YOUNG.

NOTE, This cauſe was formerly heard before MR. BARON PRICE, who ſat for the Lord Chancellor, and decreed that the children were not intitled to the two thouſand pounds till the wife's death (*a*).

(*a*) MR. BARON PRICE decreed, that the two grand-children were not entitled to have their legacies paid until after the death of the teſtator's wife; but that they were in the mean time intitled to have ſecurity for the payment thereof on her death, and were alſo immediately intitled to have an appraiſement and account of the plate, linen, and houſhold goods, and to have ſecurity that the ſame ſhould be forth-coming after the death of the tenant for life, and that the grand-children ſhould have the coſts of ſuit out of the teſtator's eſtate. And upon an appeal from LORD MACCLESFIELD's decree to the houſe of lords, it was ordered and adjudged, that ſuch part of the decree of MR. BARON PRICE as ordered the grand-children their coſts of ſuit, ſhould be reverſed; but that the ſaid decree, as to all other parts thereof, ſhould be affirmed, and the decree of LORD MACCLESFIELD, ſo far as it varied from the decree of MR. BARON PRICE, reverſed. S C. 3. Brown P. C. 50.—See Palmer *v.* Maſon, 1. Atk. 505. Heath *v.* Perry, 3. Atk. 101. Loder *v.* Loder, 2. Vezey, 526. See Mr. Cox's Note, 2. Peer. Wms. 612.

* [94]

Caſe 43.

* Bow *againſt* Smith.

Commiſſioners of ſewers made a wrong aſſeſſment, and the plaintiff by their warrant diſtrained; the Court would not relieve.

S. C. 2. Eq. Ab. 206. Bunb. 61.

THE COMMISSIONERS OF SEWERS aſſeſſed all the lands from ſuch a place to ſuch a place in THE LEVEL, to raiſe money to build a new ſluice, and by warrant, directed to the plaintiff, appointed him to collect the money of the owners and occupiers of the ſaid lands, who by virtue thereof made ſeveral diſtreſſes, and levied money of the defendant's tenants, for which he brought ſeveral actions (againſt the now plaintiff) in their names; and the ſaid aſſeſſment being not ſtrictly legal, becauſe it ſhould be aſſeſſed on every particular tenant proportionable to the damage he might ſuſtain, therefore the warrants and diſtreſſes were not good, and ſo the plaintiff could not defend himſelf at law, but a verdict paſſed againſt him.

And thereupon he exhibited his bill to ſuperſede thoſe actions, ſuggeſting this matter, and that the ſaid actions were vexatious.

The defendant inſiſts, that the commiſſioners had no power to tax him, for that there was an old ſluice near the place where the new one was intended to be built, which was ſufficient to ſecure all THE LEVEL; and that the new ſluice, when built, would be of no manner of advantage to him, and conſequently he ought not to be contributory to the charge of building it; and therefore that both he and his tenants had good right to bring actions for the money extorted from him.

* [95]

* THE LORD CHANCELLOR would not help in this caſe, for if he did, then the orders of commiſſioners of ſewers, and of the ſeſſions, would be made in this court. Now, here the aſſeſſment was wrong, and money was levied by virtue of ſuch a wrongful aſſeſſment, which ought to be refunded, and a new aſſeſſment made; and

and the right way of making it is to aſſeſs the particular lands, according to the danger they lie in; and that it is not neceſſary to name the owners or occupiers of ſuch lands, for the commiſſioners may not know them; for if not naming the owners ſhould make the aſſeſſment void, there would be an end of all aſſeſſments by commiſſioners of ſewers; therefore, if that was the fact, it might be proper for this Court to interpoſe.

Row. *againſt* Smith.

The Lord Coningſby's Caſe.

Caſe 44.

THE PLAINTIFF exhibited a bill in THE DUTCHY COURT for ſeveral lands, &c. reciting ſome acts of parliament, and ſetting forth ſeveral patents and grants from the crown, and from thence derived a title to himſelf of thoſe lands within THE DUTCHY.

If a bill in equity brought in the *Dutchy Court* to recover lands granted by the crown, omit to aver that the lands lie within the limits of *the Dutchy*, it is good cauſe of demurrer.

The defendants demur to the bill, becauſe the plaintiff did not expreſsly aver the lands to be within THE DUTCHY, but only by inference.

This demurrer was argued before the LORD LETCHMERE, *Chancellor of the Dutchy Court*, and before the *Lord Chief Juſtice* KING, *Baron* PAGE, and MR. REEVES, aſſiſtants, and they delivered their opinions *ſeriatim*, in which THEY ALL AGREED, that THE DUTCHY was a circumſcribed juriſdiction, and that in all ſuch juriſdictions, the plaintiff in his bill or declaration ought to ſhew, that the cauſe did ariſe within the juriſdiction (*a*), otherwiſe the defendant may take advantage of it by demurrer. That in courts of general juriſdiction, as THE COURT OF EXCHEQUER or KING'S BENCH, though univerſal as to the right, yet becauſe circumſcribed or limited as to perſons, ſuch averments muſt be made; though where the juriſdiction is general, ſuch allegation is not traverſable, as it is in a circumſcribed juriſdiction; therefore the plaintiff ſhould have poſitively averred theſe lands were within THE DUTCHY, otherwiſe he cannot maintain this bill.

S. C. 2. Eq. Ab. 77. 2. Peer. Wms. 299.

(*a*) 1. Saund. 74. 1. Vent. 243. 1. Sid. 87. 1. Lev. 50. 137. 2. Jones, 230. 6. Mod. 224. 2. Will. 16. Stra. 827. Ld. Ray. 1555. 2. Term Rep. 151.

*[96]

* Oſborn *againſt* Lea.

Caſe 45.

THIS was A BILL brought by the plaintiff, who was the widow of *John Oſborn*, ſon of *Sir John Oſborn*, to ſet aſide a mortgage made to one *Weeden*, who was ſteward to *Sir John Oſborn*, for that her title was precedent to the title of the mortgagee, it being by articles in marriage, and in conſideration of a portion paid, that the lands were ſettled on her in jointure.

If a mortgagee fraudulently antedate the mortgage deed, for the purpoſe of over-reaching a marriage-ſettlement, the mortgage is void; but the fact of fraud muſt be previouſly tried at law.

The defendant *Lea* by her anſwer ſaid, that ſhe was only an aſſignee of the mortgagee, and did not know that there was any prior

OSBORN *againſt* LEA.

incumbrance; and the other defendant *Weeden* ſays, that he did not know anything of the plaintiff's marriage, at or before the time of the taking the mortgage, which was for twelve hundred pounds, and that he had lent the greateſt part of that money to *John Oſborn* the mortgagor.

At the hearing this cauſe,

IT WAS INSISTED *for the plaintiff*, that this mortgage was fraudulent againſt the plaintiff.

FIRST, Becauſe it is very likely that the mortgagee, who was a ſteward in the family, muſt know that there was a treaty of marriage between *John Oſborn* and the plaintiff, and that he would not take a mortgage of the lands dated after the articles, by which the ſaid lands were to be ſettled in jointure; but admitting the mortgage was made to him before he knew anything concerning the marriage, or the articles; yet as ſoon as ever he knew that there was ſuch a treaty, and that the articles were intended to be executed, he ought to have given notice of his mortgage to the plaintiff, or to thoſe who were concerned for her in the ſaid treaty of marriage; otherwiſe it is a mere fraud, and ſhe ought now to be relieved, like the caſe of *Watts v. Treſwick* in my LORD COWPER'S time, where the heir in tail, knowing his title, became a witneſs to a mortgage; and becauſe he did not diſcover his title to the mortgagee, that very mortgage was eſtabliſhed in this court; and he was decreed to ſuffer a common recovery: ſo in the caſe of *Haws v. Potts*, where the brother, who was the remainder-man in tail, joined in the ſettlement of a jointure on his brother's wife, he was decreed to confirm the jointure.

ON THE OTHER SIDE *it was ſaid*, that every caſe depended on its own circumſtances, and that the caſe of *Watts v. Treſwick* was, that the ſon ſolicited the lending the money to * his father, and carried the deed of ſettlement to Counſel, and was a witneſs to the deed of mortgage; ſo that he was all this while contriving a fraud on the lender; therefore it was a juſt decree, that the mortgage ſhould be eſtabliſhed againſt this fraud, and againſt his title in tail.

* [97]

But in the principal caſe it appearing, that this deed of mortgage was dated the eleventh of *April* 1710, and that the marriage was had in *Auguſt* following, and *Weeden* the mortgagee having made an equivocal anſwer, that the deed was dated on or about the eleventh of *April*, and that he had paid the greateſt part of the mortgage-money, when it appeared that he had not paid four hundred pounds, part of the twelve hundred pounds, this gave ſome occaſion to ſuſpect him; and thereupon the mortgage-deed was produced in court, dated as aforeſaid, *viz.* the eleventh of *April* 1710; and ſome of the officers of the ſtamp-office attending, they affirmed, that by the ſtamp on that deed, it could not be made in

the

the year 1710, but in the year 1711, or after, becauſe that ſtamp was not uſed before that year, *viz.* before the year 1711: ſo that there is a ſtrong preſumption it was antedated on purpoſe to overreach the ſettlement on the plaintiff. OSBORN *againſt* LEA.

Thereupon THE CHANCELLOR ordered that matter to be tried at law, and ſaid, that if it was found that the ſettlement was made before the mortgage, as it was very probable it would, then the defendant *Lea* ſhould have a remedy over againſt *Weeden* the mortgagee.

But as to THE OTHER POINT, he was of opinion that it would be very hard for a mortgagee to be at the peril of loſing his mortgage-money, if he did not give notice of his mortgage to any perſon whom he knew to treat about the ſale, or any ſettlement of the lands in his mortgage; and that it very much differs from the caſe where the mortgagee himſelf helps to carry on ſuch a treaty (*a*). A mortgagee need not give notice of his mortgage to a purchaſer of the eſtate.

(*a*) See Hobbs *v.* Norton, 1. Vern. 136. Savage *v.* Foſter, 9. Mod. 36. Wilford *v.* Beezley, 1. Vezey, 6. Hobſon *v.* Rhodes, 2. Vern. 554. Berreſford *v.* Milward, Bar. Ch. Rep. 101. 2. Atk. 49. Draper *v.* Borlace, 1. Vern. 370. Moratta *v.* Murgatroyd, 1. Peer. Wms. 393. Head *v.* Egerton, 3. Peer. Wms. 280. Becket *v.* Cordley, 1. Bro. C. C. 357.

MICHAELMAS TERM,

The Eleven.. of George the Firſt,

IN

The Year

1724,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Smart *againſt* Taylor.

Caſe 46.

Information againſt a perſon for contriving to marry a woman to an ideot.

S. C. 2. Eq. Ab. 584.

TWO WOMEN being acceſſary to the marriage of a third woman to one who was an *ideot*, and who had forty-five pounds a-year in lands of inheritance, and being ordered to attend the Court, ſtood in contempt, and refuſed to appear; and being committed, they now petitioned to be diſcharged.

But one *Greenwood* being the principal contriver of this marriage, and the friends of the ideot having no evidence to impeach it in *Doctors Commons*, nor any evidence againſt this *Greenwood* but the petitioners, it was inſiſted, that they ſhould not be diſcharged without good ſecurity to give evidence of this contrivance.

Which THE COURT thought reaſonable, and therefore they were ordered to be kept in cuſtody until they give ſuch evidence, or good ſecurity for that purpoſe.

And IT WAS DIRECTED, that the attorney ſhould cauſe an information to be filed againſt *Greenwood*, and that the priſoners ſhould remain in cuſtody until they gave evidence againſt him in like manner.

Floire

Caſe 47.

* Floire *againſt* Sidenham.

If a bill in chancery be exhibited by one coheir againſt another, and the defendant acknowledge the ſettlement deeds to be in his hands, but pretends that the eſtate was deviſed to him, the Court will order him to produce the deeds to the plaintiff previous to the trial.

THE PLAINTIFF exhibited his bill as one of the coheirs of *Sir John St. Barb*, and claimed a moiety of the eſtate by virtue of a ſettlement made by one *Henry St. Barb*, the grandfather of the plaintiff, and of the now defendant.

The defendant having ſet up a will made by *Sir John* in favour of the ſaid defendant, and it being ſuggeſted in this bill that the will, if any, was fraudulently obtained,

It was prayed, that the deeds and writings concerning the lands in queſtion might be brought into court; and the rather, becauſe the defendant in his anſwer owns the ſettlement as ſet forth in the bill, and that the plaintiff is one of the coheirs of *Sir John*; but ſays, that *John St. Barb*, the father of *Sir John*, ſuffered a common recovery of all or the greateſt part of theſe lands, and declared the uſes to *Sir John* and his heirs, ſo that he might lawfully deviſe the ſame by his will.

S. C. 2. Eq. Ab. 377. S. C. Caſes in Ch. 2. S. C. 2. Chan. Caſes, 4. 1. Eq. Abr. 36. 2. Com. Dig. "Chancery" (3. I. 3.).

And now IT WAS INSISTED *for the plaintiff*, that the Court would give him an opportunity to inſpect the ſaid deeds and writings, as was done in the caſes of the *Earls of Suffolk* and *Ferrers*; and this is but a piece of common juſtice uſually done by this court in favour of an heir; nay, it hath been done in the caſe of a deviſee who is *hæres factus*, as particularly in the caſe of the late *Duke of Newcaſtle's* will (*a*); and it ought the rather to be done in the principal caſe; for though the defendant hath proved this will as executor, yet he ſays in his anſwer, that if it ſhould be ſet aſide, there are other wills in being by which the eſtate is deviſed to him.

E contra, It is admitted, that the plaintiff is one of the coheirs of *Sir John St. Barb*, but that he brought his bill in THE EXCHEQUER, ſuggeſting the ſame matter as by the preſent bill, and that upon hearing the cauſe that bill was diſmiſſed; and now he has brought a new bill in this court, and the defendant inſiſts, that if the plaintiff has any right he ſhould try it at law; and he farther inſiſts, that *Sir John St. Barb* was tenant in tail general, and that he levied a fine of the lands now in queſtion; ſo that if the common recovery, and the deed to lead the uſes thereof, doth not avoid this ſettlement, the fine will do it effectually; and that the defendant is willing to ſhew the plaintiff all the * ſettlements of the family, but not all the conveyances, counterparts of leaſes, and old deeds.

* [100]

THE COURT. The right of the plaintiff at law cannot be tried without the deeds, and there can be no reaſon why the plaintiff ſhould conteſt the will before he knows whether the teſtator had power to make it, which cannot be known without the ſettlement

(*a*) 8. Viner Abr. 551. pl. 12.

and

FREDERICK ALLEN

and the deed to lead the uſes of the common recovery; for if the plaintiff has any right, it is by virtue of this ſettlement made by his great-grandfather. And as this conteſt is between coheirs, where one ſets up a will made in his favour, and inſiſts, that he is not obliged to produce the ſettlement until the will is ſet aſide, certainly that cannot be a reaſon for not producing it, becauſe the plaintiff has no better a right to ſee it then, *viz.* after the will is ſet aſide, than he has now; therefore the beſt method is, to have the deeds brought before the Court, and that the plaintiff ſhall be paid the coſts of this ſuit.

FLOYER *againſt* SIDENHAM.

Drummond *againſt* Sir Matthew Decker. Caſe 48.

Whether a foreigner who married a ſubject of *England* attainted of treaſon ſhall forfeit her portion to the king.

S. C. 2. Eq. Ab. 477. Poſt. 104.

THE PLAINTIFF *Drummond* perſuaded the *Marchioneſs Venlete* to lay out a conſiderable ſum of money in bank annuities, and ſhe, or the plaintiff by her order, employed the defendant to purchaſe the ſame, and furniſhed him with fifty thouſand pounds for that purpoſe. Accordingly the defendant purchaſed annuities to that value in the name of the now plaintiff, but in truſt for that lady, and aſſigned part thereof, *viz.* ten thouſand pounds, to her uſe, who now by her bill demands the reſt.

The defendant *Sir Matthew Decker* confeſſes the ſum demanded to be due to the plaintiff, but ſays, he hearing ſhe was married to the late *Lord Bolingbroke*, was adviſed not to pay it without the decree of this Court to indemnify him.

THE ATTORNEY-GENERAL, who was a party, inſiſted for the king, that if in the progreſs of this cauſe any right ſhould appear to be in THE CROWN, that ſuch right might be ſaved, and ſubmits to the demands, if ſhe gives ſuch proof as ſhall ſatisfy the Court that ſhe is not married to any ſubject of the king of *Great Britain* who is attainted.

* Whereupon her affidavit was read, which was annexed to the bill, by which it appeared, that ſhe was not married, and there was no proof that ſhe was married; but if ſhe was, IT WAS ARGUED, that the law of *England* ſhould not be the meaſure of the decree of this Court in ſuch caſe, but the law of another country, this being a bare truſt for a foreigner; and the Court hath always a regard to the laws of other nations: as for inſtance, of the laws of *Holland* (*a*), and of the laws of the Plantations (*b*). * [101]

THE COURT. There is no proof made of the marriage of this lady, and therefore there cannot be any conteſt between the parties as to that matter; if there ſhould, it is probable that ſome difficult points might ariſe; for ſuppoſing ſhe was married to the *Lord Bolingbroke*, it would then be a queſtion of great importance, whether this money was forfeited or not by his attainder (*c*);

(*a*) Aſhcomb's Caſe, 1. Chan. Caſes, 232.

(*b*) Noel *v.* Robinſon, 2. Vent. 358.

(*c*) Savil, 40. Jones, 71. Noy, 6.

for

DRUMMOND *againſt* SIR MATTHEW DECKER.

for ſince all foreigners are encouraged by act of parliament to place their money in the public funds, it would be very hard that this money ſhould be forfeited; for then the conſequence would be, that a lady in *France*, who hath a ſeparate property from her huſband in her own perſonal eſtate, would, by placing it in the funds purſuant to an act of parliament, be deveſted of that property, and have it tranſmitted to her huſband by his coming over into *England*, ſo that he may diſpoſe thereof at his pleaſure; or by her being married to a ſubject of *England*, ſhould veſt in him in *France*, or in the king here, upon his attainder before or after marriage.

But as to the defendant *Sir Matthew Decker*, he hath done nothing but what he ought, for he is not to pay the money till ſecured.

Therefore IT WAS ORDERED, that he ſhould aſſign the ſecurities to the lady, and pay the reſt of the money not laid out in ſtocks, and that he ſhould have his coſts.

* [102]

Caſe 49.

* Theobalds *againſt* Duffoy.

Tueſday, 17 *November*.

A poſſibility of a term is in equity aſſignable for a good conſideration.

S. C. 2. Eq. Ab. 88. 340. 1. Peer. Wms. 572. 3. Peer. Wms. 132. 2. Atk. 420.

A FEME SOLE having a term for five hundred years deviſed to her for the reſidue thereof after an eſtate for life limited to *A.* married an alien; and with her huſband, and with privity and conſent of her relations, for a valuable conſideration, ſold the remainder of the term to *J. S.* *A.* dies during the term; then the *feme* with her huſband ſold the term to *J. N.* who, recovering the ſame at common law, the firſt ſale being void, *J. S.* the firſt vendee exhibited his bill for an injunction.

The queſtion in this caſe was, Whether an aſſignment of a poſſibility of a term ſhall be carried on in equity againſt a verdict at law, without a ſufficient equitable conſideration (which in the principal caſe was but thirty pounds)?

It is plain this aſſignment would be void at law, according to the ſixth reſolution in *Lampett's Caſe* (*a*); for the deviſe being of a term for years to the mother for life, remainder to the daughter, &c. this makes it an executory deviſe, and the ſixth reſolution in *Lampett's Caſe* is, that ſuch an executory deviſe cannot be granted over; therefore if ſuch a grant is void at law, it ſhould not be eſtabliſhed in a court of equity.

By PARKER, *Lord Chancellor*. If an eſtate be granted to *A.* for life; remainder to *B.* for life; this is a certain eſtate in *B.* and a transferable intereſt, though he may die in the life-time of *A.*; but if an eſtate for years be granted to *A.* for life, and a grant to *B.* that he ſhall have and enjoy the profits for ſo many years as

(*a*) 10. Co. 46.

ſhall

shall be to come and unexpired at the death of *A.* this cannot be good by way of remainder, and is therefore only *a poſſibility*, which at law cannot be aſſigned over, becauſe *A.* has a greater eſtate; for an eſtate for life is greater than an eſtate for years, be it ever ſo long; therefore if leſſee for a thouſand years grant it for life, he has granted all his eſtate, and cannot make any limitation over. Now the reaſon why a term for years was eſteemed in law to be a leſs eſtate than a freehold for life is this: In former days, all actions for titles to land were real, and lands being leaſed for long terms, and fines taken for ſuch leaſes, it was uſual for the leſſors, or their heirs, to ſuffer common recoveries, and by that means the leſſees were evicted, becauſe they could not falſify thoſe recoveries, until they were enabled ſo to do by the ſtatute 21. *Hen.* 8. c. 15. by which it was enacted, * "that a termor might falſify ſuch reco- * [103] "very, as any tenant of the freehold might do by the courſe of "common law, where he was neither privy or party to the ſame; "and that, notwithſtanding any ſuch recovery, he ſhould hold and "enjoy his term, according to his leaſe, againſt the recoveror, his "heirs and aſſigns." It is true, in thoſe days the terms for years were uſually granted for a ſhort time; for nobody would take long terms, becauſe the tenant of the freehold could deſtroy them *ad libitum*, by ſuffering a common recovery, as aforeſaid: therefore thoſe eſtates for years were accounted the leaſt, and next to eſtates at will. But when the ſtatute gave the termor a remedy to falſify a common recovery in defence of his term, then thoſe eſtates for years became more permanent, and for that reaſon the leſſees took long terms; and when they could not by the rules of law limit remainders over in thoſe terms, they contrived a method to do it by executory deviſes, and by limitations of truſts, which were ſupported in equity. Now, though in the principal caſe this ſhould be accounted a bare poſſibility, and not aſſignable at law, yet ſince the defendant herſelf had aſſigned this poſſibility for a valuable conſideration, and would now impeach it, becauſe it was an intereſt not aſſignable at that time, though it hath ſince veſted in poſſeſſion, this ſeems contrary to good conſcience, and a caſe wherein this Court will interpoſe and hinder her proceedings at law. Beſides, there is another decree made by the *Lord Chancellor* COWPER in favour of the now plaintiff, which muſt be taken to be right while it ſtands unreverſed; and until that is done, there ought not to be another decree in the ſame court in favour of the defendant: and upon the foot of the former decree it appears, that the defendant herſelf joined with her huſband in conveying this right to the plaintiff, who is a fair purchaſer of this reſidue or poſſibility of the term, and all this done by the conſent of her friends, which makes the caſe much ſtronger againſt her; for even a contract made by an infant, by the advice and conſent of his friends, has been decreed to be good, and that in the moſt harſh circumſtances imaginable, *viz.* by turning the intereſt into principal, upon condition that the creditor would not at that time extend

THEOBALDS *againſt* DUFFOY.

THREALD *against* DUFFOY.

extend the lands of the debtor: and this was the case of the *Lady Betty Cromwell*, an infant, who had a good estate in *Ireland*, but in the time of the rebellion there, she could not receive any of
* [104] * the rents or profits of that estate; and being very much indebted to *Sir James Emery*, by judgments and statutes, he threatened to extend the estate which she had in *England*; which if he had done, there would not be anything left to support her; therefore she, by the consent and advice of her friends, agreed, though an infant, to turn all the interest then due into principal, and to give fresh security for the payment thereof; and this agreement was established against her in this court; and why should it not against a *feme covert*, who has done the like by and with the consent of her friends; and both she and her husband were at that time maintained by the money which the plaintiff paid for this assignment?

2. Chan. Rep. 29, 30. Cases in Chanc. 169.

THEREFORE IT WAS DECREED, that there should be a perpetual injunction against the defendant; and that the first vendee should have his term (*a*).

At the hearing of this cause, THE ATTORNEY-GENERAL insisted, that the defendant being married to *an alien*, the king was entitled to her right; and that nothing vested in the husband by virtue of this marriage to avoid it; and that the assignment could not be good against that right which the king had in this term.

The wife being possessed of a term for years, and having married an alien, the marriage is not a gift in law to him of that term. Ante, 100.

To which it was answered, that if this had been an actual purchase of a term of years by *an alien*, the right would have vested in the king (*b*); but here the *alien* had no manner of right, for this being a mere possibility, could not vest in him by the marriage. It is true, marriage is a gift in law of a term for years to any subject, but not to an alien, for his wife may sue and be sued as a *feme sole*, notwithstanding her marriage with him.

1. Com. Dig. "Alien" (C. 4.).

But to this matter THE COURT gave no answer, probably because the decree did not concern any right which the king might have, it being only to stay the proceedings at law, and to quiet the plaintiff in his possession.

(*a*) See Walmsley *v.* Tanfield, 1. Ch. Rep. 18. Goring *v.* Bickerstaff, 1. Ch. Cases, 8. Pollexfen, 31. Wind *v.* Jekyl, 1. Peer. Wms. 572. Higden *v.* Williamson, 3. Peer. Wms. 132. Duke of Chandos *v.* Talbot, 2. Peer. Wms. 608. Jones *v.* Rae, 3. Term Rep. 88. Fonblanque's Equity, 1 vol. 203. 208.

(*b*) Co. Lit. 2. 1. Leon. 47. 4. Leon. 82. 2. Roll. 321. 5. Co. 52.

Case 50.

Bateman *against* Roach.

If a testator devise lands in trust for his nephew *A.* and for his niece *B* and the children of the said *B.* by her husband, to receive the profits when they come of age, and also bequeath money for the use of the said children at their respective ages of twenty-one, and afterwards make a codicil confirming those bequests, all the children of *B.* not only those she had at the time the will was made, but those she may afterwards have, take an estate in fee in the lands as tenants in common, and those who die have an equal right with those who live in the money bequeathed. —S. C. 2. Eq. Abr. 293. 303. 332. 536. 1. Ch. Rep. 224. 2. Vern. 530. 2. Com. Dig. "Chancery" (3. A. 8.). (3. Y. 8.).

THE TESTATOR being seised in fee devised his lands to trustees and their heirs, in trust for his nephew *John Hatheway*, and for his niece *Sarah Bateman*, for their lives, remainder to the

children

children of the ſaid *John*, and to the children of the ſaid *Sarah*, by her then huſband *Bateman*, in truſt that they ſhall have and receive the profits thereof when they come of age. * The ſaid *John* and *Sarah* had each of them a child when this will was made, but the child of *John* died, and *Mary* (the now plaintiff), who was the child of *Sarah Bateman*, ſurvived. * [105]

The teſtator having likewiſe deviſed four hundred pounds to his ſaid truſtees, to the uſe of the ſaid children, at their reſpective ages of twenty-one years, he afterwards made a codicil, by which he changed one of the truſtees in his will *(a)*, and confirmed all the deviſes therein; and at that time *Sarah* had two other children, who are ſince dead.

Now the repreſentatives of the dead children claiming a ſhare of the real eſtate, and a diſtribution of the four hundred pounds, the plaintiff exhibited her bill.

And IT WAS INSISTED for her, that this deviſe being *per verba de præſenti*, none but the children born at the time of the making the will could take; like the reſolution in *Wild's Caſe* (*b*), which was a deviſe of lands to the huſband and wife, and to the children of their bodies, it was reſolved, that if they had any children at the time of the making the will, they had only an eſtate for life; but if they had none at that time, then thoſe children who ſhould be afterwards born would have an eſtate of inheritance in tail.

But ON THE OTHER SIDE *it was inſiſted* for the defendant, that though there was but one child at the making the will, yet *Sarah*, the mother of that child, having two more at the making the codicil, they were entitled to take by virtue of the will, which was confirmed by the codicil; for the deviſe is *per verba in futuro*, and the legal intereſt was in the truſtees.

THE COURT was of opinion, that ſince *Sarah* had but one child when the will was made, the teſtator could never intend it to be a deviſe *in præſenti*, ſo that no other ſhould take but that child, but rather as a future deviſe, "becauſe it was to "the children of "*Sarah Bateman* by her huſband;" and it is very probable, that if he had intended it for the plaintiff *Mary*, who was the only child at the time of making the will, he would have taken notice of it in the codicil, when there were two other children to ſhare with her; and though the expreſſion as to the profits, *viz.* "that they ſhall "have and receive all the reſt of the profits (after legacies paid) "when they come of age;" yet they have a right to it in their minority, at leaſt to ſo much thereof as may be ſufficient for their ſupport and maintenance (*c*).

(*a*) See Atcherly *v.* Vernon, ante, 68.
(*b*) 6. Co. 16.
(*c*) Collins *v.* Metcalf, 1. Vern. 462. Atkins *v.* Hiſcox, 1. Atk. 501. Van *v.* Clarke, 1. Atk. 512. Walcott *v.* Hall, 2. Brown C. C. 305. Goſs *v.* Nelſon, 1. Burr. 227.

Upon

BATEMAN *againſt* ROACH.

* Upon the whole, THE COURT was of opinion, that theſe children took an eſtate in fee, as *tenants in common*; and as to the four hundred pounds deviſed to them, that they who died had an equal right with the plaintiff *Mary*, who ſurvived; for it is a ſtanding rule in this court, that where a portion or legacy is to be paid out of an eſtate in *lands*, at ſuch a time, or at ſuch an age, there, in favour of the heir at law, if the legatee die before the day, the legacy or portion is ſunk and gone *(a)*; but it is otherwiſe if the legacy is to be paid out of the perſonal eſtate (as in the principal caſe), for there it veſts immediately *(b)*, and not to be deveſted, though the legatee die before the day appointed for the payment.

Therefore IT WAS DECREED, that the truſtees ſhould account for the diſtributive ſhares of the two children (who died) out of the ſaid four hundred pounds, and alſo for their ſhares of the profits of the lands from the death of their mother to the time of their death, and that they ſhall have all reaſonable allowances, and leave to apply to the Court at any time when they ſhall find it neceſſary ſo to do.

(*a*) Smith *v.* Smith, 2. Vern. 92. Jennings *v.* Look, 2. Peer. Wms. 271. Bard *v.* Brown, 2. Chan. Caſes, 165. Carter *v.* Bletſoe, 2. Vern. 617. Prowſe *v.* Abington, 1. Atk. 485. Van *v.* Clarke, 1. Atk. 510. Duke of Chandos *v.* Talbot, 2. Peer. Wms. 610. Gordon *v.* Raynes, 3. Peer. Wms. 138. Gawler *v.* Strandwich, 1. Brown C. C. 106. Harriſon *v.* Naylor, 3. Brown C. C. 108.

(*b*) Burdet *v.* Young, ante, 93. Rivers *v.* Derby, 2. Vern. 72. Cooper *v.* Scott, 3. Peer. Wms. 119. Wilſon *v.* Spencer, 3. Peer. Wms. 192. Tunſtal *v.* Brachen, 1. Brown C. C. 124. *notis.* Hinchinbroke *v.* Seymour, 1. Brown C. C. 395.

Caſe 51.

Neeve and Others *againſt* Keck.

A man covenanted for himſelf and his heirs to ſurrender a copyhold eſtate to ſuch uſes, and died before it was done; and a bill was brought againſt his heir for a ſpecific execution of this covenant, and decreed accordingly.

S. C. 2. Eq. Ab. 24.
Ante, 62.
Ch. Caſ. 252.
2. Pr Wms. 467.
2. Vern. 97.
2. Com. D. g. "Chancery" (2. X. 2.).

THIS was a bill brought by the daughters and heirs of *Oliver Neeve*, by a former venter, againſt the defendant, who was heir at law to *Francis Neeve*; and it was to have a ſpecific execution of a covenant to ſurrender copyhold lands made by the ſaid *Francis* on the marriage of *Oliver* with his ſecond wife, who was the daughter of one *Sheffeild*.

The bill ſets forth, that in conſideration of the ſaid marriage, the aforeſaid *Oliver*, *Francis*, and *Sheffeild*, agreed to ſettle their ſeveral eſtates to the uſes following:

The eſtate of the ſaid *Oliver* was to be ſettled to the uſe of himſelf and his intended wife for life, remainder to the firſt and every other ſon and ſons of the body of the ſaid *Oliver*, on the body of *A. B.* his intended wife to be begotten; with ſeveral remainders over; remainder to the right heirs of the ſaid *Oliver* for ever. *Mr. Sheffeild* agreed to ſettle his eſtate to the uſe of himſelf for life, and after his deceaſe, to the uſe of the ſaid *Oliver* and *A. B.* his intended wife for life, remainder to the ſons of that marriage in tail male, &c. *Francis Neeve* agreed to ſettle his eſtate to the uſe of himſelf and his wife for life, with like remainders to the ſons of *Oliver* in tail male.

And

* And pursuant to this agreement, the estates of the said *Oliver* and *Sheffeild* were settled to the uses aforesaid; and the said *Francis Neeve*, in order to keep his estate in his name and blood, and in consideration of the said marriage, and of the natural love and affection which he did bear to his cousin *Oliver Neeve*, and in consideration of five shillings to him paid by the said *Oliver*, covenanted for himself and his heirs to stand seised of the lands, &c. to the use of himself for life, remainder to his wife for life, remainder to *Oliver* and his wife for life, remainder to the first and every other son and sons of the said *Oliver* in tail male, remainder to the right heirs of *Oliver* for ever; and for the consideration aforesaid, he covenanted for himself and his heirs to surrender his copyhold lands to the same uses before *Michaelmas* following.

Francis Neeve the covenantor and his wife are both since dead, and now this bill was brought against his heir at law to have a specific performance of the aforesaid covenant, having bound himself and his heirs to perform the same.

THE ATTORNEY-GENERAL, who was of Counsel for the defendant, confessed the agreement and the settlements made as set out in the bill; but insisted, that the defendant was not obliged to carry this covenant into execution. It is true, the settlement made by *Francis* was in consideration of this marriage, and to keep the estate in his name and blood; and so far *Francis* would have been obliged to perform this covenant *(a)*, and so would his heir at law *(b)*. But since the plaintiffs in this suit are the daughters of *Oliver* by a former venter, they are not likely to continue the estate of *Francis* in his name, for when they marry they must change their names; neither are they within any of the considerations of this settlement; therefore in respect to them, this covenant stands merely on the foot of a voluntary conveyance; and such a covenant was denied to be carried into execution against an heir in favour of a brother *(c)*, for no other reason but because it was voluntary.

IT WAS ARGUED *for the plaintiff*, that this was a good and formal covenant to bind *Francis Neeve* and his heirs, and that there was a very good and sufficient consideration for the same; for the marriage of *Oliver* is a consideration which goes through all the uses of this conveyance; but if that alone did not go through all the uses, yet *Oliver* and *Sheffeild* having settled their respective estates on this marriage, those settlements, * together with the marriage, * [108] are considerations sufficient to raise all the uses therein-mentioned. Now *Francis* having covenanted for himself and his heirs to surrender his copyhold lands before *Michaelmas* following to the same uses he had conveyed his freehold estate, he is a trustee in this court for the covenantee until that is done; and though he did surrender within the time, *viz.* before *Michaelmas*, according to the

(a) Peyton v. Bladwill, 1. Vern. 240.
(b) Wright v. Wright, 1. Vezey, 409.
(c) 1. Cases in Chancery, 243.

NEEVE AND OTHERS *againſt* KECK.

covenant, yet that is not material in a court of equity, where there is no regard had to ſuch circumſtances of time or place when the eſtate is once bound by the covenant; and as to the length of time before this bill was brought to have a ſpecific performance of this covenant, it cannot with any colour of reaſon be objected to the plaintiffs, becauſe they commenced this ſuit within a year after the remainder limited to them veſted in poſſeſſion. It has been objected, that in reſpect to the plaintiffs this covenant is voluntary, and ſtands merely on the foot of a voluntary conveyance, but certainly there is a wide difference between a voluntary conveyance and a voluntary covenant; for if a voluntary conveyance ſhould be defective, this Court will not inforce the execution thereof, becauſe it being defective, it doth not bind in law; but as by a voluntary covenant a man is bound in law, ſo he is alſo bound in conſcience in a court of equity; and the only reaſon why this Court will enforce a ſpecific execution of ſuch a covenant is, becauſe it is a more adequate remedy than the damages which might be given by a jury on an action at law for breach of the covenant (*a*). Therefore, ſince *Francis Neeve* hath bound himſelf and his heirs by this covenant, and ſince *Oliver* was a purchaſer under it, the plaintiffs, who are his heirs, are likewiſe purchaſers, and ought to have a ſpecific execution of this covenant; and the rather, becauſe the widow of *Francis* enjoyed this copyhold eſtate during her life, by virtue of this covenant; ſo that the defendant hath thereby admitted an execution thereof in part of the uſes limited thereby.

THE COURT was of opinion, that there were ſeveral conſiderations in theſe ſettlements ſufficient to raiſe and ſupport the uſes. And firſt, it is probable that *Oliver* would not have ſettled his own eſtate in that manner which he had done but in proſpect of the eſtate now in queſtion; for by that ſettlement there is no proviſion made for younger children; ſo that if there ſhould happen to be a ſon of this marriage, the reſt of the children would have
* [109] nothing * out of their father's eſtate but what he could provide for them in his life-time; and ſometimes it is very prejudicial to a family where the father hath a great eſtate, and no power to charge it with portions for younger children: as for inſtance, this caſe happened. The teſtator deviſed an eſtate of four thouſand pounds a-year to the deviſee for life, remainder over, but without any power of making a jointure to a wife; afterwards the deviſee ſettled all his own eſtate in jointure on the woman he intended to marry, and with whom he did marry, and then he died without iſſue; ſo that the eſtate which he took by the will went over to him in remainder, and the paternal eſtate was all in jointure to his widow, and his next relations had nothing to ſupport them. But in the principal caſe, *Oliver Neeve*, who married the daughter of *Sheffeild*, was made richer, and that might be a conſideration for

(*a*) Furnival *v.* Crew, 3. Atk. 87.

ſettling

ſettling his eſtate as he did; and the widow of *Francis* enjoyed this copyhold during her life, by virtue of this covenant by which her huſband had bound his eſtate.

Therefore IT WAS DECREED, that the defendant ſhould ſurrender this copyhold to the uſe of the plaintiffs and their heirs, and at their expence (*a*).

(*a*) See Tooke *v.* Haſtings, 2. Vern. 192. Randal *v.* Randal, 2. Peer. Wms. 97. Hobſon *v.* Trevor, 2. Peer. Wms. 464.

Wing *againſt* Wing and Others. Caſe 52.

THIS was a bill brought by the father againſt his own ſon, and againſt the father of his wife, to have a deed of ſettlement ſet aſide, becauſe not made purſuant to the articles of marriage between him and his wife; wherein the plaintiff ſuggeſts, that he was impoſed on, and ſets forth ſeveral inſtances of oppreſſion by the contrivance of his own ſon and his father-in-law; particularly, that it was agreed in and by the marriage-articles between the plaintiff and his wife on their intermarriage, to ſettle his wife's eſtate (which is the eſtate now in conteſt) on the plaintiff and his wife for their lives, without impeachment of waſte, remainder to their iſſue; but that afterwards a deed of ſettlement was made, by which the plaintiff and his wife were made tenants for life only, and by conſequence ſubject to be impeached for waſte; that the plaintiff's wife died, and then his ſon, the defendant, married the daughter of the other defendant, who was an attorney, and intruſted with all * the plaintiff's papers, and who very well knew all this matter; and that the plaintiff having afterwards diſcovered a lead-mine in the premiſes, and made a leaſe thereof to one *Jones* for twenty-one years, with power to dig for lead ore, and entered into a covenant for quiet enjoyment, and become bound in an obligation of fifteen hundred pounds penalty, conditioned for performance of covenants, by virtue of which leaſe the leſſee entered and digged for lead ore, but was obſtructed by the defendant; whereupon the leſſee brought his action againſt the now plaintiff, who was arreſted and committed for want of bail to the action; and all this was done by the contrivance of the defendants and their agents.

A decree was made in the court of exchequer againſt tenant for life, to hinder him from committing waſte, which decree was founded on a deed of ſettlement; and upon a bill now brought to ſet that deed aſide, the defendant pleaded the decree in the exchequer, which was over-ruled. S. C. 2. Eq. Ab. 71.

* [110]

The defendants plead a decree made in the court of the exchequer in favour of the ſon againſt his father, to hinder him or his leſſee to open any mines, or dig for lead ore; and that a perpetual injunction was granted againſt the now plaintiff.

THE COUNSEL *for the defendant* argued, to maintain this plea, that there being a perpetual injunction againſt the now plaintiff in a court which hath a proper juriſdiction, and can enforce an obedience to their decree, it would be inconſiſtent to have a contrary decree made between the ſame parties in this court, whilſt the firſt decree ſtands unreverſed; therefore to obviate that inconveniency, it was inſiſted for the defendant, that this plea might be allowed.

WING *against* WING AND OTHERS.

Beſides, the plaintiff (as it is proved in this cauſe, and as it appears in this deed of ſettlement which he would now avoid) had a power to charge this eſtate with two hundred and fifty pounds, which might be a conſideration for the leaving out, or for his not inſiſting to have an eſtate for life, without impeachment of waſte, which ſum was at that time a ſmart charge on the lands, being then of the value of thirty pounds *per annum*, and no more, though ſince the making the ſaid articles and ſettlement, the eſtate is very much improved by a caſual diſcovery of ſome treaſure in the bowels of the earth, but that cannot be a reaſon to make an equitable conſtruction of this agreement.

Now if this ſettlement ſhould be ſet aſide, it may be difficult to know what eſtate the plaintiff would inſiſt on; for probably he might inſiſt on an eſtate-tail, by virtue of the articles, the limitation being to him and his wife for their lives, remainder to their iſſue; and by this means would ſtrip the defendant of any benefit he might claim to thoſe lands.

[111] * Therefore ſince there is a decree made in the court of exchequer for the now defendant againſt a tenant for life, to hinder him from committing waſte, or digging mines, and a perpetual injunction for that purpoſe;

For theſe reaſons it was inſiſted, that this plea might ſtand, for that this Court cannot control a decree made in the court of exchequer, which is equally binding with a decree of this court.

THE COUNSEL *for the plaintiff* argued, that this plea might be over-ruled, for that the decree of the court of exchequer was founded on this very deed of ſettlement, which the plaintiff would now avoid, and of which he now complains, for that decree is to ſubſiſt, and to be ſupported by that deed; therefore it is inconſiſtent to plead that to the plaintiff, which he endeavours by this ſuit to avoid.

Beſides, the defendant hath not made any anſwer to that part of the bill wherein the plaintiff prays an account of the lead ore already dug by the defendant; for this decree and injunction on which he relies is only to hinder the plaintiff to dig for ore in this land, but it gives the defendant no right to dig there during the life of the plaintiff; neither doth it preclude him from having an account of what is already dug by the defendant or his agents.

Moreover, a decree may be obtained in the court of exchequer by fraud, as well as a judgment in the courts of common law; and though this Court cannot reverſe either, yet when the fraud and practice appears, they may compel the parties to take no advantage thereof, as being againſt all conſcience and equity.

Now it appears, that this decree was obtained by fraud and oppreſſion; for the attorney (who is one of the defendants in this cauſe, and whoſe daughter married the plaintiff's ſon) had all the papers

papers of the plaintiff in his poſſeſſion, and concealed them whilſt the proceedings in the exchequer were carrying on againſt him; ſo that he could not make any defence in that cauſe, for want of the articles which he ſuppreſſed. WING *againſt* WING AND OTHERS.

And it is in proof, that the now plaintiff was in cuſtody at the time this decree was made, and long before, and that it was made *ex parte* upon an affidavit of ſerving him with a *ſubpœna*; ſo that it being obtained by fraud in ſuppreſſing the articles, it cannot be a bar to the plaintiff to have an account of the profits, and to have this deed ſet aſide.

* It was admitted by the defendant's Counſel, that by the articles the plaintiff was to have an eſtate for life, without impeachment of waſte; but it was inſinuated, that before the deed of ſettlement was executed, the parties came to a new agreement, by which the plaintiff had power to charge the eſtate with two hundred and fifty pounds, and that might be the reaſon why that clauſe (without impeachment of waſte) was left out of the ſettlement, which is very true, if the fact was ſo; but that very ſum was likewiſe mentioned in the articles which the plaintiff was to have and receive out of his wife's eſtate; and it is not pretended that it was ever paid. * [112]

THE COURT was of opinion, that the decree in the court of exchequer, and the injunction to ſtay waſte, were founded on this deed of ſettlement, which if ſet aſide, the other muſt fall of courſe; and that there was ſuch an appearance of hardſhip and oppreſſion in this cauſe, that the Court held it reaſonable to over-rule this plea; and told the defendant's Counſel, that at the hearing of the cauſe they might take what advantage they could thereof; and then THE COURT would conſider, how far this decree in the exchequer ſhall conclude this Court in this cauſe.

Wafer *againſt* Mocato. Caſe 53.

THERE was an agreement between the plaintiff and the defendant, that the plaintiff, in conſideration of thirteen hundred pounds to be paid to him by the defendant, ſhould aſſign a term of years, which he had in certain houſes in *London*, which were leaſed to him by THE CITY, with a covenant that the leſſee ſhould not alien or aſſign the term without leave of THE CITY, under the penalty of forfeiting the ſaid term.

If a leſſee for years covenant not to alien without licence of the leſſor, under penalty of forfeiting the leaſe, and he afterwards aliens without licence, equity will not relieve him.

But the plaintiff having not yet gotten any licence from THE CITY, the defendant would not take any aſſignment of this term for years until ſuch licence ſhould be procured, but made over one hundred and fifty pounds *South-Sea* ſtock to the plaintiff, as a ſecurity to perform the agreement on his part.

S. C. 2 Eq. Ab. 58. Ante, 22. 91. Eq. Abr. 108. 2. Com. Dig. "Chancery" (2. Q. 9.).

Afterwards, and before any licence was procured, the plaintiff aſſigned all his intereſt in this term to the defendant, who prevailed with

WAYER *againſt* MOCATO.

with the plaintiff, that the conſideration mentioned in the aſſignment ſhould be ſix hundred pounds, and no more; which was done becauſe the true value might be concealed from THE CITY; fearing that when the defendant ſhould renew the term, THE CITY might raiſe the fine and the rent in proportion.

*[113] * Now it being plain that the plaintiff could have no remedy at law to recover any more than ſix hundred pounds, that being the conſideration mentioned in the aſſignment, and probably not that neither, becauſe having aſſigned the term without licence from THE CITY, it was a forfeiture thereof; and by that means, and by colour of an entry and eviction by THE CITY, the plaintiff would be barred of his demands; therefore this bill was brought to have the thirteen hundred pounds, according to the agreement for the aſſignment of this term for years, and to be relieved upon the whole matter ſet forth as aforeſaid.

The defendant by his anſwer inſiſts, that he was to pay but one hundred and fifty pounds *South-Sea* ſtock for the aforeſaid aſſignment, and that the houſes were of little value, and that the plaintiff had forfeited this term by making an aſſignment thereof without licence, and therefore the aſſignment was void.

THE COURT. Where a man makes a leaſe for life or for years, upon a condition of re-entry for a forfeiture, or that the leaſe ſhall be void if the leſſee aſſign or alien it without licence, and afterwards the leſſee aſſigns it without licence, this is a forfeiture, and ſuch a forfeiture againſt which this Court cannot relieve, becauſe it is unknown what ſhall be the meaſure of the damages; for this Court never relieves but in ſuch caſes where it can give ſome compenſation *(a)* in damages, and where there is ſome rule to be the meaſure of ſuch damages, to avoid being arbitrary *(b)*.

(a) 3. Chan. Caſes, 135. 1. Vern. 83 1. Vern. 270. S. C 2. Vern. 222. Grimſton *v.* Lord Bruce, 1. Salk. 156. S. C. 2. Vern. 594. Dorrington *v.* Jackſon, 1. Vern. 449.

(b) Hack *v.* Leonard, ante, 91. Wallis *v.* Grimes, 1. Chan. Caſes, 89. Popham *v.* Bamfield, 1. Vern. 79. 167.

Caſe 54. Mitford and Others *againſt* Lord Herbert, Pritchard, Croom, and Others.

Where a perſon inſiſted on an abſolute gift by the inteſtate in his life-time, when it appeared to be only a truſt.

S. C. 2. Eq. Ab. 6.

JOHN BROMLEY being poſſeſſed of a conſiderable perſonal eſtate married the daughter of the defendant *Pritchard*, from whom he afterwards departed, and thereupon ſhe obtained a ſentence for *alimony*, which he the ſaid *Bromley* diſobeying, he was *excommunicated*. Then he went to *Paris*, and placed two thouſand pounds in the Town-houſe there, in the *Lord Herbert's* name, and had a mortgage on the *Duke of Powis's* eſtate for ſecuring the repayment of a thouſand pounds, and intereſt, and had two hundred and forty pounds in ready money and jewels in his trunk, and ſome wearing-

wearing-apparel, and died inteſtate. After his death, the aforeſaid *Croom*, one of the defendants, poſſeſſed himſelf of this two hundred and forty pounds, and of all * the jewels and wearing apparel, pretending the ſame were given to him by the inteſtate in his life-time; and the widow of the ſaid *Bromley* having by her laſt will deviſed ſome legacies, made the defendant *Pritchard* executor, and died. Afterwards *Pritchard*, by virtue of the ſaid will, poſſeſſed himſelf to the value of ſeven hundred pounds of the ſaid inteſtate's eſtate.

MITFORD AND OTHERS *againſt* LORD HERBERT, PRITCHARD, CROOM, AND OTHERS.

Thereupon THE PLAINTIFFS, as nephews and next-of-kin to the ſaid *John Bromley*, exhibited this bill to have a diſtribution made to them of a moiety of the ſaid inteſtate's eſtate; and that though *Pritchard* is entitled to the other moiety by virtue of the will of his widow, yet he ought to take a moiety of the bad debts as well as of the good; and that the defendant *Croom* might be accountable to the plaintiffs for a moiety of the ſaid *Bromley*'s eſtate in his (*Croom*'s) hands, notwithſtanding the pretence of *a free gift* made thereof to him by the ſaid *Bromley* in his life-time.

THE COUNSEL for the defendant *Pritchard* ſubmitted to account for a moiety of the ſaid *Bromley*'s eſtate in his the ſaid *Pritchard*'s hands; but inſiſted, that he is entitled to have an allowance of ſuch debts which were owing to him by the inteſtate, who having left his wife, the daughter of the ſaid *Pritchard*, without any ſupport, and being gone into places remote, ſhe was maintained by the defendant *Pritchard* ſeveral years; ſo that he is entitled to retain ſo much of her huſband's eſtate as ſhall be accounted a reaſonable ſatisfaction for ſuch maintenance, and as a debt due to him from the huſband.

And as for the pretended gift to the other defendant *Croom*, it will be the intereſt of the defendant *Pritchard* to have it ſet aſide, for then he, as executor to the widow of the inteſtate, will be entitled to a moiety of his eſtate in his hands; for in truth it was not *a gift*, but *a truſt* in him, contrived between the inteſtate and the ſaid *Croom*; for that the inteſtate, being *excommunicated*, could not make a will; and if he had made one, it could not have been proved; ſo to avoid this diſability, this method was contrived between them to diſpoſe the perſonal eſtate in the life-time of the inteſtate.

As for *Adderley*, another of the defendants, there being no proof that he intermeddled with any of the inteſtate's goods, the bill, as againſt him, ought to be diſmiſſed with coſts,

* So that the chief conteſt in this cauſe was concerning the two hundred and forty pounds received by the ſaid defendant *Croom*, which, as his Counſel inſiſted, was an abſolute gift to him a few days before the inteſtate's death, ſubject to pay two legacies of ten pounds a-piece, and to pay his apothecary's bill, and the * [115]

MITFORD AND OTHERS *againſt* LORD HERBERT, PRITCHARD, CROOM, AND OTHERS.

expences of his funeral; and ſince, being excommunicated, he could make no will, it is the more reaſonable he ſhould diſpoſe his eſtate in his life-time in this manner; and it is in proof, that he often declared that his own hands ſhould be his executors, and that he would give all away whilſt he was living; and this is a very natural diſpoſition to the defendant *Croom*, who was his near relation and godſon, and the perſon whom he moſt truſted during the time he abſconded on the account of the excommunication, and the proſecution by his wife and her friends.

So that it is a donation *mortis cauſâ*, and that is, where anything is given for fear of death on ſome thoughts of a preſent or future danger; which donation is gratuitous, and an abſolute gift, and the defendant is properly entitled to the benefit thereof; and therefore not to account to the plaintiffs, or any other, for this gift.

THE COUNSEL *for the plaintiffs* averred, that the defendant *Pritchard* had admitted a great part of what they had prayed in the bill, but that he inſiſted on the allowance of ſome debts due to him from his daughter, the inteſtate's wife, and which he ought not to retain out of the money in his hands, but out of all the moiety of the inteſtate's eſtate to which he was entitled by virtue of her will.

And as for what is inſiſted on by the defendant *Croom*, that the inteſtate in his life-time gave him the two hundred and forty pounds now in his hands, there is no colour that he ſhould not account for it; for admitting it was a donation *mortis cauſâ*, ſuch a gift is good by the civil law as a will; but by that law an excommunicated perſon cannot make a will; for if he could, then ſuch perſons might diſpoſe of their eſtates by will in this manner.

Neither was this an abſolute gift to the defendant *Croom*; for it is in proof, that it was a bare truſt; and this appears by the beſt proof that can be made, and that is *teſtimonium rei*, for after the delivery of the goods, and the receipt of this money, the inteſtate appointed *Croom* to pay ſuch debts and legacies to his nephews. Beſides, there is a very ſtrong preſumption, that the teſtator was not of a diſpoſing memory at the time of making this pretended
• [116] gift; for he ſaid, it was all which he had in the world; ſo * he forgot a great ſum which he had in the Town-houſe at *Paris*, which can never be intended if he had been in his ſenſes.

THE COURT was of opinion, that this was an odd claim by the defendant *Croom*, as an abſolute gift of this two hundred and forty pounds, when it plainly appears to be *a truſt*. It is true, he ſwears in his anſwer, that the inteſtate gave him all his perſonal eſtate, and directed him to pay the apothecary's bill, and ten pounds a-piece to his two nephews; but this direction was ſubſequent in time to this pretended gift, and that proves it to be *a truſt* for the inteſtate.

Therefore

Therefore IT WAS DECREED, that the defendant *Croom* ſhould account, and that the bill ſhould be diſmiſſed with coſts as to *Adderly*; and as for the other defendant *Pritchard*, that he ſhould be allowed what was due to him for the maintenance of the inteſtate's wife whilſt he was living, but not for her maintenance ſince her huſband's death; but he is not entitled to coſts of this ſuit, unleſs they had been taxed, and aſcertained in the life-time of her huſband.

MEYRICK AND OTHERS *againſt* LORD HERBERT, PRITCHARD, CROOM, AND OTHERS.

Ord *againſt* Blackett.

Caſe 55.

Where a perſon was reported by a maſter to be a fit guardian to a *natural child*, yet ſuch guardian was not allowed, but the child was placed with the father who owned her.

ONE *Ord*, who was ſeiſed of an eſtate worth four hundred pounds a-year, had a natural daughter by *Sir William Blackett*, to which daughter ſhe deviſed "all her eſtate," and made her ſiſter *Martha Ord* executrix, and appointed her to be guardian to the infant *(a)*, and died.

The executrix, purſuant to the will, ſued for this eſtate, but died ſoon after the ſuit was begun, having firſt appointed the now petitioner *Ord* executrix, who renewed the ſuit, and recovered the lands for the infant.

But *Sir William Blackett* removed her from ſchool laſt *Chriſtmas*, and ſent her into the country, where ſhe has been kept ever ſince; for which reaſon the petitioner made application to the court of chancery, complaining, that the infant was removed from a ſchool where ſhe might have proper and ſuitable education, and ſent into the country, where ſhe could have none.

S. C. 2. Eq. Ab. 487. Ante, 42. Poſt. 138. Amb. 306.

This petition being referred to A MASTER to name a proper ſchool, and a guardian for this infant, he reported the petitioner to be a fit guardian, and *Mr. Cavalrie*'s ſchool a proper ſchool for her education.

The petitioner therefore petitioned, that the child might be delivered to her, and ſent to the ſaid ſchool.

* The Counſel for *Sir William Blackett*, the child's father, and who owns her as his daughter, and who preſerved this eſtate for her againſt the heirs at law, conſented to ſend the child to *Mr. Cavalrie*'s ſchool, but oppoſed the delivery to the petitioner, or that ſhe ſhould have the laying out any money for clothes, or other neceſſaries, for the child, ſhe being very poor, and having already pretended, that ſhe deſerved one hundred and eighty pounds for her care in attending this child; therefore the money to be laid out for neceſſaries ought rather to be paid to *Mr. Cavalrie* or his wife than to the petitioner.

* [117]

THE COURT was of opinion, that removing this child from ſchool into the country, to *Sir William Blackett*'s houſe, could

(a) That a mother cannot appoint a guardian by will, ſee Vaughan, 180. *Ex parte* Edwards, 3. Atk. 519.

neither

Ord against Blackett.

neither be uſeful or inſtructive to her, becauſe he was a ſingle man, and kept no perſons proper for her education; yet it was not thought reaſonable to remove her from his care, ſince he owned her to be his child (*a*), but that he ſhould pay the coſts of the petitioner's application to the court out of his own money; for otherwiſe he might remove her from one ſchool to another, and the coſts of applying to this court would be paid out of the infant's eſtate.

(*a*) See Roach v. Couvan, 1. Vezey, 358. Melliſh v. Da Coſta, 2. Atk. 15. Harg. Co. Lit. 88. b. note (12). Hopkins' Caſe, 3. Peer. Wms. 152. Ward v. St. Paul, 2. Brown C. C. 583.

Caſe 56.

Smithſon and Others *againſt* Dodſon.

Tithes of hay ought to be paid in graſs cocks.

3. C. 2. Eq. Ab. 738. Carth. 264.

THIS was a bill brought by the pariſhioners of *Gargrave*, in *Yorkſhire*, againſt the defendant, their VICAR, to produce an ancient terrier in his cuſtody, which ſhews the method of payment of tithes in that pariſh, which they ſuggeſt to be a *modus*, viz. for hay the vicar is to have the tenth graſs-cock (*a*), and three half-pence for every milch-cow, and a penny for every ſwarm of bees, and ſixpence for every orchard.

The bill prayed, that the Court would direct an iſſue or trial at law to ſettle this *modus*; and ſets forth, that the predeceſſor of the defendant did, about thirty years ſince, alter the payment of this *modus*, and combined at that time with his clerk to raiſe the fees for burials, &c. which fees had been paid ever ſince.

The defendant admits there was a *modus* ſome years ſince for payment of tithes in this pariſh, and that he has a terrier in his cuſtody of all the tithes payable to the vicar, and that he had been very much harraſſed at law, when he was willing to take the tithes according to the terrier in his cuſtody, ſo as he might have them peaceably; and as to the fees for burials, marriages, chriſtenings, and churching of women, he * inſiſts, that the ſame ſhould be paid as uſual; for that they were not proper for a *modus*, becauſe there is no canon to aſcertain what ſhall be paid, if the ſums now paid ſhould be diſcharged; but it is not in other caſes; for if a *modus* ſhould be deſtroyed, then tithes in kind muſt be paid; therefore, as to that matter, the bill is improper, and ought to be diſmiſſed, ſince the Court hath nothing before them to aſcertain the meaſure of ſuch fees; and the defendant is in no fault, but by continuing the payment of the fees as he found them paid before he was vicar.

* [118]

THE COURT held, that the tithe-hay muſt and ought to be paid in graſs cocks; and as to the tithes of cows, bees, and orchards, the parties did not differ in the manner of payment, but only in the ſurplice-fees for burials, &c.

(*a*) See Barnam v. Gawſe, 1. Roll. Abr. 644. The Cumberland Caſe, 2. Roll. Rep. 172.

Therefore

Therefore IT WAS ORDERED, that they ſhould attend A MASTER to ſettle how far they differ in that matter, and the conſideration of coſts ſhould be reſerved until THE MASTER makes his report.

SUFFOLK AND OTHERS *againſt* DODSON.

But as to that part of the plaintiff's demands which the defendant did not controvert, nor inſiſt on anything to the contrary, the pariſhioners were ordered to pay coſts.

Where the pariſhioners ſhall pay coſts.

Lucas, Executor of Sir Robert Adams, *againſt* Adams. Caſe 57.

THIS was a bill brought by the executor of *Sir Robert Adams*, to have an account of three hundred pounds borrowed of him by the defendant *Adams*, for the payment of which ſaid ſum, with intereſt, the defendant entered into a bond to the ſaid *Sir Robert Adams* of the penalty of four hundred pounds, conditioned for the payment of two hundred pounds, and at the ſame time gave him two notes under his hand of fifty pounds each note, but afterwards, by unfair means, prevailed on the obligee, who was ſuperannuated, and not in his ſenſes, to give him (the defendant) a releaſe of all demands on the payment of twenty pounds, and on pretence of being his near relation.

The obligor, on payment of 20l. to the obligee, procured a bond and notes for money to be delivered up to him, upon pretence that he was poor, and nearly related to the obligee; but that not being proved, he was ordered to account for the bond and notes.

The defendant, by his anſwer, ſays, that he, being nearly related to *Sir Robert Adams*, did borrow the money of him as mentioned in the bill; but being poor, he, the obligee, when he was in his perfect ſenſes, *viz.* in the year 1714, promiſed to forgive him this debt, which, in the year following, *viz.* in the year 1715, he did accordingly forgive; therefore inſiſts, that he is not liable to account for it to the plaintiff.

S. C. 2. Eq. Ab. 6. 48a.

* THE COUNSEL *for the defendant* admitted, that there was AN INQUISITION taken, by which *Sir Robert Adams* was found to be out of his ſenſes; which inquiſition was taken in the year 1720, but goes no farther back than three years, *viz.* to the year 1717; and this debt being diſcharged in the year 1715, the defendant is willing to try, whether the obligee was then in his ſenſes, or not?

* [119]

THE COUNSEL *for the plaintiff* ſaid, that if the Court ſhould make the leaſt difficulty to decree for the plaintiff upon reading his proofs in this cauſe, that he would then be willing to try it at law, whether the obligee was in his ſenſes at the time he executed this releaſe; but if upon the proofs it ſhould appear, that he was not in his ſenſes, then the plaintiff ought not to be ſent to a trial of that matter at law. It is true, the defendant ſwears in his anſwer, that he did believe that the obligee had not forgot either the bond or the notes at the time of his ſealing this releaſe, which he obtained as his near relation, but gives no manner of proof how, or how near, he was related, which he ought to have done, becauſe it is the pretended conſideration of this releaſe; therefore if that fails (as it doth)

Lucas, Executor of Sir Robert Adams, *against* Adams.

doth) the reſt muſt fall of courſe: as where the teſtator deviſed one hundred pounds to *T. S.* by the name of his couſin *T. S.* when in truth he was not related to the teſtator, in ſuch caſe the legatee ſhall never have this legacy.

Beſides, there is no manner of proof that any ſuch conſideration of nearneſs of relation was mentioned at the time the releaſe was executed, but that the defendant brought twenty pounds, and told the obligee, that he had a bond, which he came to pay, and immediately on payment of the ſaid money he got up the bond, and obtained this releaſe; but after all, the payment of the ſaid twenty pounds is inconſiſtent with the pretended conſideration of nearneſs of relation, which the defendant hath ſet forth in his anſwer.

The Court. Here is a bond got by the obligor from a weak perſon, the obligee, and a releaſe of all demands, upon pretence of nearneſs of relation, and of being poor; but neither of theſe conſiderations are proved in the cauſe. But it plainly appears, that the obligor paid twenty pounds as a conſideration of this releaſe; and there being no notice taken at that time of what ſums were due, either on the bond or notes, this ſeems to induce a ſuſpicion, that the payment of that money was the only conſideration of delivering
* [120] * them up, and executing this releaſe; and that the obligee did not know at that time that anything more was due to him, being very weak and forgetful, and incapable of tranſacting any buſineſs.

So it was decreed, that he ſhould account both for the bond and notes.

Caſe 58.

Cox and Others *againſt* Coffin and Others.

Bill againſt a mortgagee, to compel him to reconvey upon payment of principal and intereſt.

The plaintiff, who was heir at law, exhibited a bill to redeem a mortgage made by his anceſtor.

The case upon the pleadings was thus; One *Butchin* having occaſion for money borrowed it of one *Fry*, and to ſecure the repayment thereof, with intereſt, he mortgaged his lands to *Fry* for two thouſand years, with a proviso to be void upon payment of the principal and intereſt; and ſoon afterwards he died. In the year 1696, the plaintiff and her ſiſter, who were heirs at law to the mortgagor, exhibited their bill to redeem, and the defendant *Coffin* was employed by them to proſecute the ſuit; and *Fry* the mortgagee, in his anſwer to that bill, ſubmitted to a redemption upon payment of the principal and intereſt; but *Coffin* perſuaded them, being ignorant women, to drop that ſuit, alledging, that the lands were not worth redeeming. *Fry* the mortgagee, ſome time afterwards, by will, deviſed this term and eſtate to one *Grove*, whom he made executor, and died; and then the now defendant, *Coffin*, purchaſed it of the ſaid *Grove*, and by his agent, *Willis*, threatened the now plaintiffs to exhibit a bill to foreclose them of the

the equity of redemption. The now defendant *Coffin*, after he had purchaſed this term of *Grove* for one hundred pounds, in conſideration of ſo much money paid to him, aſſigned part of the eſtate to one *Lake* for five hundred years, being part of the ſaid term of two thouſand years, and afterwards ſold the remainder of the term to *Willis*.

Now the end of this bill was, that the defendant *Coffin*, who knew the plaintiffs' title, and by unfair and fraudulent means diſſuaded them from purſuing their right, and afterwards purchaſed this mortgage for himſelf, may be obliged to re-convey upon payment of ſo much money which he paid for the purchaſe.

THE COUNSEL *for the plaintiffs* ſaid, that there were two things to be conſidered in this cauſe: FIRST, * Whether this is a redeemable eſtate; and, SECONDLY, If ſo, then on what conditions it ſhall be redeemed?

* [121]

AS TO THE FIRST POINT, It is plain, that this is a redeemable eſtate; for upon filing the firſt bill, *Fry*, the original mortgagee, under whom the defendant claims, ſubmitted to a redemption; but the defendant *Coffin*, who was then ſolicitor for the plaintiffs, diſſuaded them to redeem; and the other defendant *Willis*, who acted for *Coffin*, threatened to foreclose the equity of redemption: now this ſhews, that he knew it was a redeemable eſtate; therefore the plaintiffs are entitled to redeem.

AS TO THE SECOND POINT, Upon what terms the plaintiffs ſhall redeem, it was inſiſted, that they ſhould redeem upon payment of the principal ſum of one hundred pounds, and intereſt, which ſaid ſum of one hundred pounds the defendant *Coffin* paid to *Grove* upon the purchaſe of this term; for as he was ſolicitor for the plaintiffs, he is to be taken as a truſtee for them, and therefore ſhould be contented to receive what he paid for them, deducting the rent.

And as for *Lake*, who took the term of five hundred years of *Coffin*, this ſeems to be a truſt for him; but if it was granted to him *bona fide*, without any truſt, yet he took it with his eyes open, and ſhall not be in a better condition than *Coffin*, under whom he claims.

Therefore it was inſiſted for a decree to redeem, &c. (*a*).

(*a*) Jaſon *v.* Eyres, 2. Chan. Caſes, 33. Howard *v.* Harris, 1. Vern. 33. 190. Maulove *v.* Ball, 2. Vern. 84. Willet *v.* Winnel, 1. Vern. 488. Croſt *v.* Powell, Comy. Rep. 603. Exton *v.* Greaves, 1. Vern. 138. Floyer *v.* Levington, 1. Peer. Wms. 268.

HILARY

HILARY TERM,

The Eleventh of George the First,

IN

The Year

1724,

IN

The Court of Chancery.

The Earl of Macclesfield, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Buggins *againſt* Yates.

Caſe 59.

ONE *Buggins* being ſeiſed in fee of ſeveral eſtates in *Middleſex* and *Worceſterſhire*, in the year 1674 deviſed the lands in queſtion to *Mary Buggins*, his wife, and to her heirs and aſſigns for ever, to be ſold to pay his debts and legacies in aid of his perſonal eſtate.

Lands deviſed to his wife and her heirs, to be ſold for the payment of debts and legacies in aid of the perſonal eſtate, and not being ſold; if the perſonal eſtate is ſufficient to diſcharge the whole, the heir ſhall have the lands as a reſulting truſt.

But the perſonal eſtate being ſufficient to ſatisfy and diſcharge all his debts and legacies, and the real eſtate not being ſold, the plaintiff, as heir at law to the teſtator *Buggins*, inſiſted, that he is entitled to theſe lands as a reſulting truſt for him, and that the deviſee was a truſtee for that purpoſe.

THE COURT was of opinion, that where lands are deviſed to be ſold in aid of the perſonal eſtate for payment of debts and legacies, and the lands are not ſold, for that the perſonal eſtate is ſufficient to diſcharge the whole, it is plainly an implied truſt in the deviſee

S. C. 2. Eq. Ab. 588.

Ch. Caſes, 197. 2. Vern. 245. 247. 2. Ch. Caſes, 115. 1. Salk. 153. 3. Peer. Wms. 153. 2. Com. Dig. "Chancery" (3. A. 5.). T. Vezey, jun. 444.

for

BUGGINS against YATES.

for the heir at law, and he is entitled to come into this court to have a reconveyance, and an account of the profits (*a*).

Deviſe void for uncertainty.

And THE COURT being about to make the decree, it was ſaid, that here was likewiſe a truſt of the perſonal eſtate, *viz.* the teſtator in his will declared, that he did not doubt but his wife would be kind to his children.

But THE COURT was of opinion, that thoſe words gave a right to no child in particular, or a right to any particular part of the eſtate, * but that the clauſe was void for incertainty (*b*):

* [123]

And thereupon IT WAS DECREED, that the defendant ſhould make a reconveyance of the real eſtate.

In what caſe the Court will direct an inquiry into the perſonal eſtate of a teſtator.

But then IT WAS INSISTED *for the defendant*, that the Court would direct an inquiry of the value of the teſtator's perſonal eſtate, becauſe it appeared in the cauſe, that there was ſix thouſand nine hundred pounds ſtanding out in debts and legacies; and that the perſonal eſtate amounted to four thouſand pounds, and no more, ſo that if the deviſee paid the reſt of the debts and legacies out of her own effects, ſhe is intitled to be repaid out of theſe lands deviſed to her; and there is a very ſtrong preſumption that ſhe paid to the value of this land; for there is a legacy of two thouſand pounds deviſed to her, which ſhe never raiſed, becauſe ſhe apprehended the eſtate was her own, being deviſed to her and her heirs; and therefore ſhe deviſed it to her ſecond huſband *Yates* for life, which he enjoyed twenty-two years under that deviſe, and ſhe likewiſe deviſed the inheritance in parcels to her three ſons, *viz.* to the plaintiff, and the defendant, and to another ſon ſhe had by her huſband *Buggins*; and the plaintiff, after the death of *Yates* the ſecond huſband, entered by virtue of that deviſe; and by his bill he claims under the will of *Mary Yates*, ſo that he admits ſhe had a power to deviſe, which is enough to affirm the right of the defendant.

Executory deviſe.

Beſides, there is another thing to be conſidered in this cauſe, VIZ. *Mary Buggins*, the widow of the teſtator, upon her intermarriage with *Yates*, reſerved a power to diſpoſe this eſtate as ſhe ſhould think fit, notwithſtanding her coverture, and after the ſaid marriage, ſhe deviſed it to her huſband *Yates* for life as aforeſaid, remainder in parcels to her three ſons and their heirs; "PROVIDED "that if any or either of her ſons died under twenty years, and

(*a*) See Maſſey v. Sherman, Amb. 520. Wynne v. Hawkins, 1. Bro. C. C. 179. Nowlan v. Neligan, 1. Bro. C. C. 491. Rogers v. Rogers, 3. Peer. Wms. 193. S. C. Prec. Chan. 81. S. C. 1. Bro. P. C. 66. Bicknel v. Page, 2. Atk. 79. Calton v. Hancock, 2. Atk. 438. Walker v. Jackſon, 2. Atk. 625. Haſelwood v. Pope, 3. Peer Wms. 325. Bridgman v. Dove, 3. Atk. 202. Lord Inchiquin v. Obrien, 1. Wilſ. 82. Amb. 33. 1. Brown C. C. 458. Samwell v. Wake, 1. Brown C. C. 144. Chetty v. Parker, 2. Vezey, jun. 271.

(*b*) See Cunliffe v. Cunliffe, Amb. 686. Harland v. Trigg, 1. Bro. C. C. 142. Wynne v. Hawkins, 1. Bro. C. C. 180. Nowland v. Neligan, 1. Bro. C. C. 489. Pierſon v. Garnet, 2. Bro. C. C. 38. 226. Malim v. Keighley, 2. Vezey, jun. Rep. 333.

"without

"without iſſue, that the ſhare of him or them ſo dying ſhould go "to the ſurvivor or ſurvivors." Now *John Buggins*, one of her ſons, died under twenty years, and without iſſue, ſo that the lands which were deviſed to him muſt deſcend to the plaintiff and the defendant equally; for this being a common contingency, and having happened, whether it is by limitation of a uſe, or by executory deviſe, the remainder over is always good. Buggins *againſt* Yates.

THE COURT was of opinion, that this could not be an *executory deviſe*, becauſe the teſtatrix was a *feme-covert*.

But the defendant's Counſel preſſing for an inquiry into the value of the perſonal eſtate of the teſtator *Buggins*, though it ſeemed hard to grant it after ſuch a length of time, * unleſs there was a very great ſurplus; yet an account was directed to be taken thereof, and that all the deeds and writings concerning this eſtate ſhould be brought before THE MASTER; and the conſideration of this remainder over ſhould be reſerved until the account of the perſonal eſtate was taken; and then it would appear what right the teſtatrix had to deviſe all or any part, and what part of this eſtate. *[124]

Sir John Fryar *againſt* Vernon. Caſe 60.

UPON A MOTION for a *ſequeſtration* of the defendant's eſtate in *Ireland*, for a contempt to this court; The court of chancery will not grant a *ſequeſtration* of lands in *Ireland*.

THE MASTER OF THE ROLLS was of opinion, that ſuch ſequeſtration could not be granted, or at leaſt that he would be well adviſed before he would grant it; for that the proceſs of this court could not affect any lands in *Ireland*. The practice in ſuch caſes being to make affidavit, that the perſon ſtanding in contempt is here in *England*, and being afterwards taken upon proceſs, the Court will oblige him to give bail to abide and perform their decree.

S. C. Caſes in C. 5. S. C. 2. Peer. Wms. 262. S. C. 2. Eq. Ab. 711. 1. Vern 135.

421. 2. Com. Dig. "Chancery" (3. K.).

Whitechurch *againſt* Whitechurch. Caſe 61.

Before the Lords Commiſſioners RAYMOND *and* GILBERT.

ONE *Whitechurch*, the anceſtor of the plaintiff, had a mortgage for five hundred years of the lands now in queſtion, and took another term for two thouſand years of the ſame land, to commence after the expiration or determination of the firſt term; and to avoid a merger thereof, he got it conveyed to another perſon in The mortgagee had a term for 500 years and afterwards took another term of the ſame lands for 1000 years in the name of a third perſon, to commence after the determination of the firſt term, in truſt for himſelf; and afterwards he purchaſed the fee ſimple in his own name; and then he deviſed the ſaid lands to *E. G.* for life, remainder in tail, &c. This will was void ſo as to paſs the lands, becauſe not atteſted by three witneſſes; but it was inſiſted that it was good to paſs the term of 1000 years as a term in groſs, and ſeparated from the inheritance; but decreed that it was a term which attended the inheritance by implication of law; for it is not expreſsly deviſed for that purpoſe, and there is no apparent intention, that the teſtator deſigned to paſs it as a ſeparate intereſt.—S. C. Rep. Eq. 168. S. C. 2. Peer. Wms. 236. S. C. 2. Eq. Ab. 763. S. C. 1. Stra. 619. 2. Wil. Rep. 236, pl. 60. Gilb. Eq. Rep. 168. 2. Com. Dig. "Chancery" (3. A. 8.).

WHITE-CHURCH *againſt* WHITE-CHURCH.

truſt for the mortgagee; and afterwards he purchaſed the inheritance in his own name, and it was conveyed to him accordingly, ſo that he had the legal eſtate of that term of five hundred years, which ſtood unmerged by reaſon of the intermediate term, together with the inheritance in himſelf.

* [125] * Afterwards by will he deviſed the ſaid lands to the defendant *Whitechurch* for life, remainder to his firſt, and every other ſon and ſons in tail male, and made *T. S.* his executor, and died.

Now this will was not executed according to the ſtatute; for though it was all of the teſtator's hand writing, and ſigned by him, yet it was not atteſted by three witneſſes, as required by the ſtatute; but the executor having aſſented to the legacy, the defendant was, as he inſiſted, poſſeſſed of the legal eſtate of this term of five hundred years.

However, the will being not good to paſs the inheritance, the plaintiff, as heir at law to the teſtator, exhibited his bill againſt the deviſee, and againſt the executor, and againſt the truſtee of the term of two thouſand years, to compel them to aſſign both the ſaid terms to a third perſon in truſt, to attend and protect the inheritance for him, that being the only uſe of ſuch terms for years, as he inſiſted.

For the defendant.

IT WAS ARGUED *for the defendant*, that the principal point to be conſidered in this caſe, is what eſtate the teſtator had in him at the time he made this will; and to judge rightly of that matter, ſome conſideration muſt be had both of the principles of law and equity. Now a term attending on the inheritance, is in equity to be conſidered of no other uſe than to protect the inheritance, though at law it is a ſeparate intereſt; and if it is only to protect the inheritance, then the teſtator had no other eſtate when he made his will, but an inheritance which he had chiefly in contemplation, and intended to paſs at that time. It is true, if there had been any expreſs declaration of the teſtator's intention in this will to paſs the term excluſive of the inheritance, there it might paſs; but it plainly appears he intended only to paſs the inheritance, and there is nothing in the will which neceſſarily implies a ſeparate deviſe of this term. It was ſaid, that where a man is ſeiſed of an inheritance, and has an unmerged term in notion of law, and he deviſes the inheritance, the deviſee may in this court compel the executor to convey the term to a truſtee to attend and protect the inheritance, becauſe the term is in the executor, upon that truſt only; and it is very wrong to affirm, that when the inheritance doth not paſs, that the heir at law cannot compel ſuch executor to aſſign the term. It was reſolved in the caſe of the creditors of the *Earl of Pembroke* by ſimple-contract, that they ſhould be paid out of an unmerged term he had in him, becauſe ſuch term was a chattel

* [126] * liable to their demands; but if the term had been in a truſtee for *the Earl*, it had been otherwiſe. So in the principal caſe, though the will is not ſufficient to paſs the inheritance, becauſe it wants that requiſite which the ſtatute directs; yet it is ſufficient to paſs

this

this term to the defendant, who having the legal eſtate therein, this Court will not interpoſe, and take it from him in favour of the heir, who is a volunteer; for it is a rule in equity never to interpoſe in favour of one volunteer to the prejudice of another, but to let him who hath the law on his ſide take advantage thereof, eſpecially where the intereſt of a purchaſer for a valuable conſideration doth not interpoſe; ſo that upon the whole it was inſiſted, that this unmerged term in the ſame perſon is to all intents as a term in groſs, and ſhall paſs by this will as a chattel intereſt.

WHITE-CHURCH *againſt* WHITE-CHURCH.

GILBERT, *Baron*, was of opinion, that this was a term attending the inheritance, and to protect the ſame from intermediate incumbrances, and that an unmerged term in the ſame perſon is in him in nature of a truſtee to attend the inheritance; and that it would be very dangerous to all the inheritances in *England*, if unmerged terms ſhould be taken to be terms in groſs in the owners of the inheritances, and paſs as ſuch. Now in the principal caſe, if this ſhould be conſtrued as a term in groſs, then it is ſuch a chattel intereſt as may paſs by this will, though all the ſolemnities required by the ſtatute are not obſerved; but if it is a term annexed unto, and attending the inheritance, it cannot paſs by this will in any other manner than the inheritance would paſs. Now it has been allowed at the bar, that the term for two thouſand years is annexed to the inheritance, but the term for five hundred years is not; but no reaſon was given why there ſhould be ſuch a difference between theſe two terms, that one ſhould, and the other ſhould not attend the inheritance: and certainly it can never be ſaid with any colour of reaſon, that where a mortgagee of a term of years purchaſeth the inheritance, that ſuch term when in himſelf, and unmerged, ſhall go and deſcend in another courſe different from the inheritance; for it is the conſtant and uniform conſtruction in this court, that ſuch a term ſhall be annexed unto, and protect the inheritance, and attend the ſame; and it would be a dangerous conſtruction in equity to make the inheritance and the term ſeparate and diſtinct eſtates in one perſon.

* RAYMOND, *the other Commiſſioner*, differed a little. He was of opinion, that where the teſtator expreſsly deviſes ſuch a term, or where it comes to an executor by implication, as a chattel intereſt, *viz.* by a deviſe of all his chattels; or where it veſts in an adminiſtrator generally, without making any will; in ſuch caſes the heir at law would be proper to apply to this court to have the term aſſigned to another to attend and protect the inheritance; but that ſince it is agreed on all hands that this term paſſeth at law, it is a queſtion, Whether this Court can take it from him to whom it is deviſed, in favour of the heir at law, who is a volunteer as well as the deviſee? It is true, where a term is expreſsly limited to attend the inheritance, there, though the teſtator likewiſe expreſsly deviſeth it to another, it will not paſs; but where it attends the inheritance only by conſtruction or operation of law, or in an equitable notion, as a term bought in and aſſigned by creditors, or

* [127]

WHITE-CHURCH *against* WHITE-CHURCH.

terms raiſed for children's portions, or for other particular purpoſes; there, if the teſtator expreſsly deviſeth ſuch terms, they will paſs. But where a man hath a term for years, which by intendment of law only attends the inheritance, certainly he hath a power to ſever ſuch a term from the inheritance; and if he ſhould aſſign it to one man and mortgage the inheritance to another, in ſuch caſe the term ſhall not attend the inheritance, but it becomes a term in groſs; and why ſhould not a man have the like power to do the ſame thing by will, if he thinks fit?

But there is this farther to be conſidered in the principal caſe, that as in this will there is no apparent intention, that the teſtator deſigned to paſs this term as a ſeparate intereſt from the inheritance, though there are ſufficient words to paſs it in general; then, whether ſuch general words ſhall, after the death of the teſtator, ſever this term from the inheritance, which attended and protected it in notion of equity, before ſuch deviſe was made.

But this point was not debated:

For IT WAS DECREED, that the term did not paſs by this deviſe, which plainly appeared to be of the inheritance only, without any intent to paſs the one excluſive of the other; therefore the Court was clear in opinion, that the term ſhould not be ſevered from the inheritance, and paſs to the deviſee by the general words of this will; though there were ſufficient words to paſs it, if it had been a term in groſs, and that the executor of this will
* [128] * was a truſtee for the heir at law, and his aſſent to the legacy was of no effect, but that the term was ſtill in him to perform the truſt, which he was obliged to execute.

A decree for confirming or avoiding a will, where *an infant* is heir or deviſee, is final.

Then ANOTHER QUESTION was made, and ſtrongly inſiſted on by THE ATTORNEY GENERAL, *viz.* That the deviſee being *an infant*, the decree ſhould not be final on him, but that he might have leave to ſhew cauſe againſt it within ſix months (*a*) after he came of age.

2. Vezey, 23. 1. Brown C. C. 484. 2. Com. Dig. "Chancery" (3. R. 3.). Fonth. Eq. 75.

But THE COURT was clear in opinion, that the decree ſhould be final, for that in caſes of truſts infants are always bound by decrees of this court, and ſo they are where the will of the anceſtor is conteſted; and it is either ſet aſide or confirmed in equity after trial of an iſſue *deviſavit vel non*, or where it is otherwiſe ſet aſide without a trial at law; and there is ſcarce any caſe where an infant has time to ſhew cauſe againſt a decree, but where it is neceſſary for him to join in a conveyance in order to complete the eſtate, and where ſuch conveyance is of the inheritance, as in decrees of foreclоſure of mortgagors, &c. (*b*).

(*a*) See Mallack *v.* Galton, 3. Peer. Wms. 352.

(*b*) See Booth *v.* Rich, 1. Vern. 255. Cook *v.* Parſons, 2. Vern. 429. Brook *v.* Hereford, 2. Peer. Wms. 518. Gregory *v.* Molesworth, 3. Atk. 626.

Reeves

Reeves *againſt* Reeves. Caſe 62.

THE father of the plaintiff and the defendant, in conſideration of his marriage with their mother, and of a portion in money, did, in the year 1673, article to ſettle his eſtate to the uſe of himſelf for life, then to his intended wife for life, then upon truſtees to preſerve contingent remainders, then to the firſt ſon of that marriage, and to all and every other the ſons, &c. in tail male, with ſeveral remainders over, with power to make a jointure to any other wife of a thouſand pounds a-year; and a proviſo, that it ſhould be lawful for him, by and with the conſent of the truſtees, to ſell the eſtate, and with the money ariſing by ſuch ſale to purchaſe other lands, and to ſettle the ſame to the like uſes as in the ſaid deed dated in the year 1673.

By marriage-articles the eldeſt ſon was made tenant in tail; proviſo, that the father might ſell the lands by the conſent of the truſtees, and purchaſe other lands, and ſettle them to the like uſes; he purchaſed other lands, but did not ſettle them to the like uſes, yet held good.

Afterwards the father ſold the lands, and with the money purchaſed other lands now in queſtion; and in the year 1692, he ſettled the new purchaſed lands, by and with the conſent of the truſtees in the firſt ſettlement, to the uſe of himſelf for life, remainder to the defendant for life (who by the firſt ſettlement had an eſtate-tail), remainder to truſtees to preſerve contingent remainders; then to his * firſt and every other ſon in tail male, with ſeveral remainders over, with a power to make a jointure to any woman he ſhould marry, of the yearly value of ſix hundred pounds, and ſoon after the father died.

S. C. 2. Eq. Ab. 719. Poſt. 165. Caſes T. T. 20. * [129] Fitzg. 38. 1. Peer. Wms. 622. 1. Atk. 371. 2. Com. Dig. "Chancery" (3. Z. 11.) (3. Z. 12.).

Then the defendant, who was his eldeſt ſon, in conſideration of his marriage, and of a marriage-portion, by deed dated 1698, conveyed the new purchaſed lands to truſtees to the uſe of himſelf for life, then to his intended wife for life, then to truſtees to preſerve contingent remainders, then to his firſt and every other ſon in tail male, with ſeveral remainders over.

The defendant, *Thomas Reeves*, having only a daughter, and no iſſue male by his ſaid marriage, would now ſell theſe lands, alledging, that the remainders limited to the iſſue male were voluntary, not being within the conſideration of the ſettlement made by him in the year 1698.

Therefore this bill was exhibited by the next in remainder to obſtruct the ſale, and to oblige the truſtees to enter to preſerve the contingent remainders; and that the deeds and evidences may be brought into court to know how the title ſtands; he ſuggeſting, that by the marriage articles of their father, dated in the year 1673, he covenanted to ſettle his eſtate as aforeſaid, but with a proviſo to ſell the ſame by and with the conſent of the truſtees, and to purchaſe other lands, and to ſettle them upon the ſame uſes as in the firſt ſettlement, &c.

AND IT WAS ARGUED *for the defendant*, that the ſettlement in 1673, made upon the marriage of the father, both of the plaintiff and defendant, though mentioned to be by *articles* only, was and

REEVES *againſt* REEVES.

is a good ſettlement by way of *covenant to ſtand ſeiſed*; and that the defendant is by the expreſs words of that ſettlement made tenant in tail of the lands ſold; and the proviſo being to ſettle the new purchaſed lands to the ſame uſes as in the firſt ſettlement, it was not in the power of his father to make him tenant for life by any other ſettlement whatſoever, ſo that he muſt ſtill remain tenant in tail of the new purchaſed lands; and that ſettlement made by his father in the year 1692, when he purchaſed thoſe lands, as far as it croſſes the limitations in the firſt ſettlement, is entirely void, being voluntary; ſo that the ſettlement made by the defendant, in the year 1698, upon his marriage, is good; and ſuch of the lands which are not contained in that ſettlement the defendant may ſell, and the plaintiff hath no right to conteſt the ſale even of
* [130] * thoſe lands, he being no ways within the conſideration of that ſettlement.

ON THE OTHER SIDE *it was inſiſted for the plaintiff*, that this ſettlement made by the father, in the year 1692, of the new purchaſed lands, appears on the very face of it to be made in conſideration of the ſettlement made by him in the year 1673, which though mentioned to be by articles, yet ſtrictly ſpeaking thoſe articles amounted to *a covenant to ſtand ſeiſed*; and the ſettlement made in 1692 being in execution of that covenant, and acquieſced under ever ſince it was made, muſt now be taken as a full and entire execution of that covenant: and though the father could not be compelled by a court of equity to make the defendant tenant for life, who by the firſt ſettlement was tenant in tail; yet the father having of his own accord, and with the conſent of the truſtees, made this ſettlement, and no objection made to it during his life, the defendant ſhall not be admitted to ſay it is not good, it not correſponding with the proviſo in the firſt ſettlement. This is not like the caſe of *Wakely v. Wakely*, where the father, on his intermarriage, &c. articled to convey his eſtate to the uſe of himſelf and his wife for life, remainder to the heirs of their two bodies; and afterwards he had iſſue a ſon, who coming of age, the father by his laſt will, which he mentioned to be in execution of the articles, deviſed the eſtate to his ſon for life, remainder to his firſt and every other ſon, &c. in tail male, with ſeveral remainders over, and afterwards the ſon brought his bill in this court to be relieved againſt this deviſe, it not correſponding with the articles: and the Court declared, that though by the equity of the *articles* the ſon ſhould be tenant in tail; and if he had ſued in this court to compel the father to an execution of the ſaid articles, the Court would have decreed an eſtate-tail to him; yet if the father, by the conſent and approbation of the truſtees, had made ſuch a ſettlement, this Court would never ſet it aſide. But in that caſe the father had done it by his laſt will, without the conſent of the truſtees, and without the conſent of the ſon, who was then of age; and by that means the ſon having no power to make a jointure, or any charge

charge on the lands to make proviſion for younger children, that deviſe was ſet aſide. But in the principal caſe, the ſettlement in 1692 was made by the conſent of the truſtees in the firſt ſettlement, which * is therefore good, and a full execution of the covenant in that ſettlement. And ſo is *Matthews's Caſe*, who by his father's marriage-articles was made tenant in tail; but ſome time afterwards the father made a ſettlement by which *Matthews* was made tenant for life, with a power to ſettle a jointure of ſix hundred pounds a-year on any woman he ſhould marry; and being about to marry, it was the opinion of ſeveral eminent lawyers he could make no greater jointure; for though he was tenant in tail by *the articles*, and if it reſted there, he might have made what jointure he thought fit; yet being tenant for life by a ſubſequent ſettlement varying from the articles, he could not make the jointure beyond ſix hundred pounds a-year; and thereupon he applied to the parliament, and obtained an act to make up the jointure a thouſand pounds a-year, but that his eſtate in poſſeſſion, and all the remainders over, ſhould continue as before.

* [131]

Next THE COUNSEL *for the plaintiff* cited the caſe of *Burton v. Haſtings (a)* in this court, which was thus, *viz.* By the marriage-articles, the wife's eſtate was to be ſettled on the huſband and wife, and on the heirs of their two bodies to be begotten; and afterwards it was ſettled to the uſe of the huſband and wife during their lives, remainder to the firſt and every other ſon of the huſband in tail male, remainder to the heirs of the body of the wife; they had no ſon, and but one daughter; the huſband died, and his widow married again, and then the huſband and wife joined in a fine, and ſettled the eſtate to other uſes; thereupon the daughter exhibited her bill, and prayed relief on the articles, becauſe by the equity thereof the huſband and wife ought to be but tenants for life, and the ſubſequent ſettlement could not enlarge the eſtate of the wife to an eſtate-tail general, *viz.* to her and the heirs of her body; but ſhe had no relief, the *Lord Chancellor* COWPER declaring he could not relieve againſt the ſettlement; though if it reſted on the articles, without any ſettlement made, he would have decreed, that the articles ſhould be carried into execution.

It was *further inſiſted for the plaintiff*, that he was proper in this application, and had reaſon to pray the aid of this court; and for that purpoſe a caſe was cited between *Sir Richard Mead* and the *Lord Kerry*, which was thus, *viz.* The late *Lord Kerry*, in conſideration of a marriage and a marriage-portion, ſettled his eſtate to the uſe of himſelf for life, then to truſtees to preſerve contingent remainders, * then to his firſt and every other ſon in tail male, &c. and before he had any iſſue, he borrowed money of the plaintiff, and for ſecuring the repayment thereof with intereſt, he

* [132]

(a) Eq. Abr. 393. pl. 4. Gilb. Eq. Rep. 113.

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levied a fine, &c. And upon a ſpecial verdict found in the cauſe, the queſtion was, if the charge was good againſt the preſent lord, for that on his father's levying the fine, the truſtees did not enter to preſerve the contingent remainders; ſo that it is very proper that the plaintiff in the principal caſe ſhould come into this court to compel the truſtees to enter, in order to preſerve the contingent remainders, eſpecially ſince the plaintiff is a purchaſer under the ſettlement made in the year 1692, for that his father, who made that ſettlement, had thereby abridged his power of charging the eſtate with a thouſand pounds a-year, which by the ſettlement made in the year 1673 he had power to do.

THE COURT. Every remainder-man has a right to come into this court, and pray the aid thereof to compel perſons to bring in the deeds and evidences relating to the eſtate; but this is a bill of the firſt impreſſion as to the prayer for the truſtees to enter to preſerve contingent remainders, for their title is merely at law; neither doth it appear in the cauſe, that the truſtees refuſed to enter. Now if this caſe is conſidered upon the deed made in the year 1673, the defendant is tenant in tail of the lands thereby ſettled; but the deed made 1692 of the new purchaſed lands was intended to be a family ſettlement, and a full execution of the covenant in the deed made 1673, by which deed the defendant being made tenant for life, he ſhall not be at liberty to incumber any part of the lands thereby ſettled by his father; therefore the decree was for the plaintiff.

And in pronouncing this decree THE LORD CHANCELLOR ſaid, that where a ſettlement is made by the father, or other lineal anceſtor, in conſideration of the marriage of his ſon, in ſuch caſe all the remainders limited to his children and their poſterity are within the conſideration of that ſettlement; but when it is made by a brother or any other collateral anceſtor on his intermarriage, there, after the limitations to his own iſſue, all the remainders limited to his collateral kindred are voluntary, and not within the conſideration of the marriage-ſettlement.

* [133]

Caſe 63.

* Southwell *againſt* Lord Limerick.

Depoſitions taken *de bene eſſe*, and before the defendant had put in his anſwer, or iſſue joined.

S. C. 2. Eq. Ab. 418.

THIS was a bill to redeem a mortgage made in the year 1636; and upon a motion for publication of the depoſitions,

THE QUESTION was, Whether a depoſition taken *de bene eſſe* on a commiſſion formerly iſſued to examine witneſſes, and taken before the defendant had anſwered, or iſſue joined in that cauſe, ſhould be now read at the hearing of this cauſe? and according to the reſolution in *Brown's Caſe* (*a*) it ought not. The caſe was thus: Upon a bill in THE EXCHEQUER to preſerve the teſtimony of witneſſes, one *T. S.* being a witneſs, and ſick, was upon hearing

(*a*) Hard. 315.

of

of Counſel on both ſides, and by order of Court, examined *de bene eſſe* on the part of the defendant. Afterwards on the twenty-eighth of *November*, the anſwer came in, and the witneſs died on the eighteenth of *December* following; and by the opinion of all the Judges, it was held, that his depoſition could not be read in evidence at a trial in law, in ejectment, becauſe it was taken before iſſue joined, and he lived long enough after the anſwer came in to be examined in chief. Where there is no default in the defendant, a depoſition taken *de bene eſſe* on behalf of the plaintiff, and the witneſs dying ſoon after ſuch depoſition taken, it ſhall not be read; but in the principal caſe that reaſon fails, for the plaintiff was kept out of the anſwer by the defendant for above two years by privilege of parliament, and other delays; and the commiſſion to examine in chief was taken out in *July* laſt; and by affidavits made in this cauſe it appears, that this witneſs, who was examined *de bene eſſe*, was on the fifteenth day of *June* (before the ſuing out any commiſſion) ſtruck blind, and loſt the uſe of her memory, and ſoon after died: but if ſhe had lived, ſhe could not have been examined, for the reaſon before mentioned; therefore as this delay was occaſioned by the defendant, it was inſiſted, that this depoſition taken *de bene eſſe* might be read at the hearing this cauſe, and publiſhed with the reſt of the depoſitions.

SOUTHWELL *againſt* LORD LIMERICK.

IT WAS SAID *on the other ſide*, and admitted to be true, that where the delay is made by a defendant, ſo that a witneſs cannot be examined in chief, he either loſing his memory, or dying before he can be examined in chief; in ſuch caſe, * his depoſitions taken *de bene eſſe* may be read: but if the delay is on both ſides, they ſhall never be read againſt the defendant, becauſe he loſes the benefit of croſs-examining the witneſſes. Now in this caſe there was a greater delay made by the plaintiff than by the defendant, for the bill was filed againſt him whilſt he was in *Italy* and *Spain*, on his travels, and as ſoon as he returned in *December*, *&c.* he put in his anſwer, which was filed the tenth of *February* following; and from that time to the twenty-eighth of *April*, which is about eight weeks, the plaintiff did not think fit to reply; but as ſoon as his replication came in, the defendant rejoined, and on the ſecond of *June* gave commiſſioners names to the clerk of the other ſide; but the plaintiff did not join in commiſſion till the twenty-eighth day of the ſame month, ſo that the greateſt delay was on his ſide. So where the mother was examined *de bene eſſe*, and lived eight months after, in which time ſhe might have been examined in chief, but ſhe died without being examined, it was held, that her depoſitions *de bene eſſe* ſhould not be read in evidence.

For the defendant.

* [134]

At the ſame time it was moved, that the publication of depoſitions *in perpetuam rei memoriam* might paſs, and they might be read on the hearing this cauſe, the witneſſes being ſince dead.

THE COURT. It is the work of another day, to determine whether thoſe depoſitions may be read in evidence or not.

Therefore

SOUTHWELL *againſt* LORD LIMERICK.

Therefore no opinion was given as to that matter:

But IT WAS ORDERED that publication ſhould paſs, and that if the plaintiff thought fit, he might make this objection in proper time.

† In *Hilary Term*, in the ſecond year of *George the Second*, this caſe was ſolemnly argued before LORD KING, *Lord Chancellor*, aſſiſted by LORD RAYMOND, *Chief Juſtice* of the king's bench, and SIR ROBERT EYRE, *Knt. Chief Juſtice* of the common pleas: and it appearing in the cauſe, that the defendant had kept the complainant out of an anſwer, and that the proceſs of contempt were all run out againſt him before he anſwered;

THE COURT and JUDGES were unanimouſly of opinion, that the depoſitions taken *de bene eſſe* on the commiſſion formerly iſſued to examine witneſſes, and which were taken before the defendant had anſwered, ſhould now be read and given in evidence, though the defendant loſt the benefit of croſs-examining.

EASTER TERM,

The Eleventh of George the Firſt,

IN

The Year

1724,

IN

The Court of Chancery,

IN

Ireland.

Weſt, *Lord Chancellor.*

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* Morgan *againſt* Dillon.

Caſe 64.

UPON A PETITION to have the three children of *Sir Arthur Shean* removed from the defendant *Dillon*, and to be delivered to the plaintiff, or to ſome other perſon whom the Court ſhould appoint;

The huſband deviſed his real eſtate to his three daughters and their heirs, and then by a codicil he deviſed it to his wife, if his three children ſhould die without iſſue, and made her GUARDIAN to his children, and died; ſhe married again; the guardianſhip was taken from her by the Court.

THE CASE was thus:—*Sir Arthur Shean* being ſeiſed of a conſiderable real eſtate, and being likewiſe poſſeſſed of a great perſonal eſtate, married the plaintiff *Morgan*'s daughter, by whom he had iſſue three children; and being advanced in years, and his wife a young woman, he deviſed his real eſtate to his three daughters, and their heirs, and by his will appointed his wife to be their guardian; and he deviſed a hundred pounds a-year to each of them during their infancy, for their maintenance; and two parts of all his perſonal eſtate to his ſaid three children, and the third part to his wife. About three hours before his death, the ſaid *Sir Arthur Shean* made a codicil by which he confirmed his will, but deviſed his real eſtate over to his wife, in caſe his three children ſhould die without

S. C. 11. Viner, Ab. 432. S. C. 2. Eq. Ab. 453. 487. S. C. 3. Bro. P. C. 341. 2. Com. Dig. "Chancery" (3. O. 3).

MORGAN *againſt* DILLON.

out iſſue of their bodies, and ſoon after died; and about ſix months after his death his widow married the defendant *Dillon*.

In the argument of this caſe there were two points very well debated, which though in *Ireland*, yet ſeem very uſeful to explain the law concerning guardians.

* [136] * FIRST, Whether this lady, who was a teſtamentary guardian, was removable by the Lord Chancellor.

SECONDLY, Whether her marriage with the defendant *Dillon* is ſuch an act as will amount to a breach of that truſt repoſed in her by the teſtator, ſo as to render her incapable of ſuch truſt, and to be removed by this Court on account of the marriage, and the remainder limited to her in fee on the death of the three children without iſſue.

AS TO THE FIRST POINT,

IT WAS ARGUED *for the plaintiff*, that this lady being to enjoy the eſtate on the death of theſe children without iſſue, it would be dangerous to continue her in the guardianſhip, eſpecially ſince ſhe is married to a young gentleman, who in her right will be guardian to them, and whoſe children by her will be entitled to inherit this remainder; therefore it is certainly in the power of this Court to remove a teſtamentary guardian in caſes of ſuch unforeſeen accidents. The civil law, which the teſtator underſtood very well, ought to be the rule in this caſe: now, by that law, if the mother of infants marry a ſecond huſband, the education of her children may be taken from her (*a*).

IT WAS ARGUED *for the defendant*, that this lady being a teſtamentary guardian, according to the ſtatute 12. *Car.* 2. c. 24. by which it is enacted, "that the parent of a child under age, and "not married, may by deed or will diſpoſe the cuſtody of ſuch "child, for and during ſuch time as the child ſhall remain an in"fant, or for any leſſer time, to any perſon other than a popiſh re"cuſant; and that ſuch diſpoſition ſhall be good againſt any per"ſon claiming the cuſtody of the child as guardian in ſocage, or "otherwiſe; and that the perſon to whom it is diſpoſed may main"tain an action of raviſhment of ward or treſpaſs, againſt any other "who ſhall wrongfully take away or detain ſuch child, for the re"covery of the child, and ſhall recover damages for the uſe of "the child. And the perſon to whom it is diſpoſed ſhall and may "take into his cuſtody the profits of all the infant's lands, and the "management of his perſonal eſtate till his age of twenty-one "years, or any leſſer time, according to ſuch diſpoſition, and may "bring actions in relation thereunto, as by law a guardian in com"mon ſocage might do." That this Court could not remove ſuch guardian, unleſs guilty of ſome miſdemeanor, which might render * [137] her incapable * of performing the truſt repoſed in her: and as to

(*a*) 1. Domat, 270.

the

the objection, that her ſecond marriage will make her incapable, it is probable it may be ſo by the civil law, which will not hold in this caſe, becauſe this lady was appointed guardian by the will of the father of theſe children, and by virtue of a ſtatute which gave him power ſo to do; and the teſtator, at the time of making his will, ſaw all the inconveniencies which are now ſuggeſted in behalf of the plaintiff; for he muſt neceſſarily preſume this guardian, being very young, would marry again; nor can the preſumptions of ill-nature, or deſtroying the infants, be applied to a mother, as they might to another who is next of kin, becauſe it muſt be preſumed, that whatever parents can get will be for the benefit of their own children. Now, ſince the teſtator has, by this appointment in his will, adjudged the mother to be a proper perſon to be intruſted with the education of her own children, a court of equity will not break through ſuch a will; for that would be to make a new will after the death of the teſtator. It would likewiſe be a breaking through that power which the ſubject has purchaſed at a great rate, and that is by ſettling a perpetual revenue of tonnage and poundage on the crown, in conſideration of taking away the court of wards and liveries, and turning all the old tenures into free and common ſocage, and to prevent diſputes which might be made by diſpoſing by will or otherwiſe lands held in knight's-ſervice, giving men power to diſpoſe the cuſtody of their children during their minority, which is a privilege that cannot be taken from them ſince the making that ſtatute, which is plainly implied by the words of the ſtatute itſelf; for power given to parents to diſpoſe their children to any perſon except to popiſh recuſants, is an implication, that any other perſon who is appointed to be guardian by virtue of this ſtatute, cannot be removed by this Court. It is true, where there is a guardian by *the common law*, a court of equity may interpoſe; but where by *the ſtatute*, it cannot (*a*): as for inſtance, the teſtator deviſed the guardianſhip of his ſon to his mother-in-law, and died; afterwards the widow married a ſervant, and being poor, the uncle of the child got the poſſeſſion of the infant, and ſent him beyond ſea; but the Court ordered him to reſtore the child to the guardian (*b*), for that they could neither remove the child or the guardian, but would make her give ſecurity * not to marry the infant without firſt acquainting the Court (*c*). And as a guardian is not removable, ſo the guardianſhip is not aſſignable; neither ſhall it go to the executor or adminiſtrator of the guardian (*d*), becauſe it is a perſonal truſt repoſed in him, and therefore not to be determined but by his death.

* [138]

As to THE SECOND POINT,

IT WAS ARGUED, that the marriage of this guardian did not make her incapable of the guardianſhip, becauſe, as it hath been

(*a*) 1. Peer. Wms. 703. 2. Com. Dig. "Chancery" (304.) (3. O. 5.).
(*b*) 3. Salk. 177. 2. Caſ. Ch. 237.
(*c*) 2. Caſ. Ch. 238. 2. Peer Wms. 110. Caſes T. T. 58. 2. Com. Dig. "Chancery" (3. O. 3.).
(*d*) Bedell *v.* Conſtable, Vaugh. 180.

already

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already obſerved, it is a perſonal truſt repoſed in her, and the marriage cannot be an aſſignment thereof, becauſe it runs in perſonal privity; and therefore it cannot be forfeited by the attainder or other miſdemeanor of the huſband: it is like the caſe where a *feme ſole* was made truſtee, or where ſhe has goods as executrix or adminiſtratrix, her marriage is no reaſon to remove her from ſuch truſt or executorſhip. Now, if the deviſe of the guardianſhip to this lady ſhould be void, the maintenance deviſed to her children would likewiſe be void, and then ſhe would be guardian to theſe children by nature, and certainly her marriage, without ſome other default, would not have determined ſuch guardianſhip; and there cannot be any convincing reaſon why it ſhould be determined by her marriage, now ſhe is a teſtamentary guardian, than it would have been if ſhe had been a guardian at common law; for the deviſe of the remainder in fee to her cannot be any objection upon this ſtatute: for at common law, the lord, as guardian in chivalry, would have the wardſhip of the body and the lands; though if the ward had died without heirs, he was to have his lands by eſcheat; in which caſe it cannot be denied but the lord was to have ſome benefit by the death of the ward, as the guardian is to have in the principal caſe, if her children ſhould all die without iſſue. The limitation of ſuch a remainder to a guardian would have been no objection at common law to remove her from the guardianſhip, for if it ſhould, it muſt ariſe from a preſumption, that the guardian may deſtroy the child; but in this caſe neither the teſtator, nor any other perſon, could or can preſume that the mother would deſtroy her own children; but any man might imagine ſhe would marry again, being young and in the prime of her youth. Now, the reaſon of removing a guardian at common law is, becauſe the guardianſhip might be caſt on one who is worth * nothing, or an ideot or madman; and therefore it was reaſonable that this Court ſhould interpoſe, and grant relief to the infant, by appointing a guardian who might educate him ſuitable to his degree and quality; and this ſtatute was intended to remedy thoſe inconveniencies by giving the parents power to aſcertain the perſon, and to appoint ſuch a perſon to be guardian to their children in whom they could beſt repoſe that truſt; which appointment is not like a bare power, but it is coupled with the greateſt intereſt which a parent hath in his children; therefore ſuch a guardian is not to be removed by this Court.

* [139]

THE COURT. There are two points in this caſe:—FIRST, Whether this Court can remove a *teſtamentary guardian*. SECONDLY, as this caſe is circumſtanced, Whether there is a ſufficient foundation for this Court to remove thoſe children from the cuſtody of the defendants, if they are removable at all.—At common law, before the ſtatute 32. *Hen.* 8. c. 46. by which the court of wards and liveries was erected, THE LORD CHANCELLOR was the ſole Judge of wardſhips; but with this difference, that where they were lucrative to THE CROWN, there the LORD TREASURER

TREASURER acted, who had a concurrent juriſdiction with THE CHANCELLOR; but where wardſhips were not lucrative to THE CROWN, but only for the benefit of the ward, there THE CHANCELLOR alone had the diſpoſition and management of the ward; therefore as the law now ſtands, the *onera feudorum* being extinct, and the court of wards aboliſhed, and all the old tenures being turned into free and common ſocage (*a*), all wardſhips which are beneficial for the wards muſt return to this court, as to their original fountain (*b*). It is true, there were ſome ſtatutes which altered the common law as to the perſons of wards; as for inſtance, A guardian in ſocage, or in chivalry, had the cuſtody of the perſon at common law; but by the ſtatute of 4. & 5. *Edw.* 6. c. 8. it appears, "that the father of any maid or woman-child unmarried, "and within the age of ſixteen, might by his laſt will and teſta-"ment, or by any other act in his life-time, appoint, aſſign, be-"queath, give, or grant the order, keeping, education, or govern-"ment of ſuch maid, or woman-child, but not of the males;" probably, becauſe the females are more expoſed to contingencies than the other. * That ſtatute related only to the perſons of infants, but the ſtatute 32. *Hen.* 8. c. 1. of Wills, relates to their lands: for whereas before that ſtatute a guardian in ſocage had the cuſtody both of the perſon and lands of the ward; now by that ſtatute, the father had power by his laſt will and teſtament, or by any act lawfully executed in his life-time, to diſpoſe all his lands held in ſocage at his free will and pleaſure. And by virtue of that act, fathers did uſually deviſe their ſocage lands by will to ſome perſons in truſt, for the heir during his infancy; and by this means the guardian in ſocage perceiving there was no benefit to be had by the guardianſhip, very often declined it; ſo that the heir was without any guardian; which being a very great inconveniency, was intended to be remedied by the aforeſaid ſtatute 12. *Car.* 2. c. 24. which gave the father a power, either by deed or will, to appoint a guardian; but this was only as to the *modus habendi*, for it gave the guardian (thus appointed) no new authority which he had not before; it does not deſcribe his power, but explain its prevalency againſt guardians in ſocage, who were the next of kin, to whom the inheritance could not deſcend, and who claimed the guardianſhip before this ſtatute was made. The ſpiritual court might appoint a guardian to an infant (*c*) who had only a perſonal eſtate; but where he hath ſuch an eſtate, and alſo lands, ſuch an appointment is void. This Court might likewiſe appoint a guardian where there was not a rightful one before, and even where there was a real as well as a perſonal eſtate; and could remove ſuch guardian, though made by the appointment of this court, if he afterwards became not fit or improper to be a guardian; but a rightful guardian was not removable *ad libitum*, as guardians appointed by this court or by the ſpiritual court might. A ſtatute guardian

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* [140]

(*a*) See 12. *Car.* 2. c. 24.
(*b*) 2. Caſ. Ch. 136.
(*c*) Biſhop of Carliſle *v.* Wells, 2. Lev. 162.

may

Morgan against Dillon. 2. Chan. Caſes, 237.

may be likewiſe removed for a juſt cauſe; and for this there is a plain authority in *Sid.* 424. which was but nine years after the making the ſtatute; and contemporary expoſitions have been always thought the beſt method of explaining the meaning of ſtatutes. Now in that caſe it was held, that a ſtatute guardian might be removed; which ſhews, that it hath been admitted even in a court of common law, that a teſtamentary guardian is under the control and inſpection of a court of equity, as ſuperintendant of all guardianſhips; and in the caſe of *Foſter v. Denny (a)*, * this Court ordered a guardian to give bail; and if ſuch an order is good, it may compel him to do any other act which may be thought neceſſary for the benefit of the infant. At common law there were four ſorts of guardians, and every one of them removable: FIRST, There was a *guardian by nature*, and this was the father, who is the root out of which all other guardians ſpring; and there are inſtances where the father hath been removed from the guardianſhip of his child (*b*), or hath been compelled to give ſecurity for the benefit of the infant; and if ſo, then certainly a derivative guardian may be removed, for he can have no greater privilege or immunity than a primitive and original guardian from whom he derived. And even a guardian in chivalry, who at common law had the wardſhip both of the body and lands of the ward, might be removed by this Court for any miſbehaviour or ill uſage of the perſon of the ward, becauſe a guardian never had any intereſt in the body of an infant, but for the benefit of ſuch infant; and whenever he miſuſed that intereſt, this Court could remove the perſon out of his cuſtody: it is true, as far as ſuch wardſhips were lucrative, the guardians, as they had an intereſt by the law, did enjoy the ſame without the interpoſition of this Court. There was likewiſe at common law *a guardian in ſocage*, which was purely for the benefit of the infant, and accountable to him, and removable by this Court upon any miſbehaviour, or obliged to give ſuch ſecurity to account as the Court thought proper. There was alſo a guardian by nurture, and this was the mother; and ſhe was removable as the father, and for the ſame cauſe; and ſo was a teſtamentary guardian.

* [141]

The next queſtion may be, Whether there are grounds in the preſent caſe to remove this teſtamentary guardian? Now as to that matter, it hath been rightly obſerved at the bar, that this petition is brought *quia timent*; but in this caſe, as well as at common law, there is a difference between a wardſhip as it works upon the perſon of the ward, and as it works on his eſtate; for that which operates on the perſon, muſt be helped by anticipating the evil, and in ſuch caſe a remedy is to be ſought *quia timent*; for there can be no reparation *ex poſt facto*, but as it operates on the eſtates of the wards, a reparation may be made, and an application is proper in this court *ex poſt facto*; nay, that is the only time for that purpoſe: as for inſtance, * The father of an infant being

* [142]

(*a*) 1. Eq. Abr. 260. 2. Chan. Caſes, 237. (*b*) Hardres, 96.

indebted

indebted to the defendant, granted the guardianſhip of his children to him (the defendant) with a covenant in the deed not to revoke it; the bill was to bring the guardian to account, and to remove him; but becauſe there was a juſt debt due from the father to the guardian, the Court would not reſtrain him from receiving the rents of the infant's eſtate, but only from abuſing his perſon (*a*). Now, if this Court can interpoſe in any caſe where there is a teſtamentary guardian, why not in this, if it is thought neceſſary ſo to do? The propoſition is general: Either a guardian can or cannot be removed at all. That he cannot is falſe, if he can in any one caſe; and that it can in ſome caſes, hath been already proved by the authorities cited; therefore it may be done in this caſe. It is true, here is a remainder limited to the mother, and it muſt be admitted, that at common law this was a good objection to remove a guardian in ſocage, upon a preſumption, that ſuch a guardian who was the next of kin might deſtroy the ward; but ſuch a preſumption could never prevail in the caſe where a parent was guardian; for it would be a monſtrous preſumption, that a man ſhould deſtroy his own child to inherit his eſtate; neither can the want of good-nature be preſumed in this lady towards her own children, ſo as for any man to imagine ſhe could be guilty of ſuch an act. But ſhe is married, and under the control of her huſband, who in her right will be guardian, and his children by her will inherit thoſe lands, if the children by her firſt huſband ſhould die without iſſue; and how can the mother ſhew her affection or good-nature to thoſe children who hath nothing for them but what is under the power and control of her huſband, and who in reality is guardian, which certainly is going out of the will, and what the teſtator never intended?

Therefore IT WAS DECREED, that thoſe children ſhould be removed from the mother their guardian, and that the Court would appoint ſome proper perſon amongſt their relations to receive them; but that the mother ſhould be at liberty to ſee them as often as ſhe would.

As to the guardianſhip of the lands there was no decree made, becauſe there was another bill depending as to that matter; but THE CHANCELLOR declared, that a perſon bred to hardſhip and penury, and who afterwards makes his own fortune, and keeps it, is more likely to deal fairly with infants, than one born to an eſtate, and who becomes neceſſitous by ſquandering it away; for * ſuch perſons rarely retrieve their fortunes, but are always neceſſitous. * [143]

But the decree in this caſe was reverſed in THE HOUSE OF LORDS upon an appeal, and *Lady Shean* confirmed in the guardianſhip (*b*).

(*a*) Lecone *v.* Shires, Vern. 442.

(*b*) But that a guardian appointed by will, purſuant to the 12. *Car.* 2. c. 24. is within the preventive and controlling power of the court of chancery, ſee the Duke of Beaufort *v.* Pretty, 1. Peer. Wms. 703. Harg. Co. Lit. 88. note 12, 13, 14, 15, 16. See alſo Darcy *v.* Lord Holderneſs, Trinity Term 1725, *coram* KING, *Lord Chancellor*, Buttler *v.* Freeman, Ambl. 302. Currie *v.* Hunter, 1. Peer. Wms. 705. *notis*. *Ex parte* Richards, 3. Atk. 518.

Caſe 65.

Webber *againſt* The Earl of Montrath.

If there was no legal tenant to the *præcipe*, in order to ſuffer A COMMON RECOVERY; yet after length of time it ſhall be preſumed, that there was a legal tenant.

S C. 2. Eq. Ab. 693.

TENANT IN TAIL (remainder in tail to the defendant) made a leaſe for ninety-nine years, determinable on three lives, with a covenant that the leſſee ſhould renew, &c. and afterwards he mortgaged the lands to *T. S.* in fee, who aſſigned the mortgage to one *Flower*.

Afterwards the leaſe for lives (which was prior to the mortgage) being determined, the ſaid tenant in tail made a new leaſe to the now plaintiff, purſuant to the covenant in the firſt leaſe, and then he and the aſſignee of the mortgagee joined in a conveyance of the equity of redemption to one *Alcock*, in order to make him a tenant to the *præcipe*; and thereupon A COMMON RECOVERY was ſuffered, in which the tenant in tail was vouched, and he vouched over the common vouchee, and ſoon after died without iſſue.

Then the defendant, the *Earl of Montrath*, got this mortgage to be aſſigned to one *Geering*, in truſt for himſelf, and brought an ejectment on a double demiſe by him and the ſaid *Geering*.

And thereupon the plaintiff exhibited this bill to ſtay the proceedings at law; and having got *an injunction*, a motion was made to diſſolve it upon coming in of the anſwer:

But THE COUNSEL *for the plaintiff* inſiſted, that it might be continued on the equity confeſſed in the anſwer, it appearing that the aſſignee of the mortgagee did join with the tenant in tail in the conveyance to *Alcock*, to make him a legal tenant to the *præcipe*: and though it was objected, that this remainder to the defendant could not be barred, becauſe there was no legal tenant to the *præcipe*; yet it was inſiſted for the plaintiff, that this recovery being ſuffered in the year 1702, which was now more than twenty-three years paſt; if he could not ſhew that there was a legal tenant to the *præcipe*, it muſt be preſumed in his favour (as a purchaſer) that after ſuch a length of time there was ſuch a legal tenant.

And if this may be preſumed, then the mortgagee, who is a truſtee for the mortgagor, and he joining with the (*a*) *ceſtui que truſt* in ſuffering this recovery, it ſhall be a bar to all remainders; and this is proved by the caſes cited in the margin, where it was held, that a (*b*) recovery ſuffered by * *ceſtui que truſt* in tail barred the intail and all the remainders, and that ſuch a recovery ſhall have the ſame effect in a court of equity, and bind the truſt in the ſame manner as it would the eſtate in law, in caſe he had the legal eſtate in him; and as to a fine, it had never been doubted of late, and that even a bargain and ſale enrolled by *ceſtui que truſt* of an eſtate-tail ſhould bind the iſſue, becauſe ſuch truſt is not within the ſtatute *De Donis*.

* [144]

(*a*) The mortgagor.

(*b*) 2. Chan. Rep. 78. Vern. 13. 226. 440.

THE

THE COUNSEL *for the defendant inſiſted*, that the plaintiff ought to give a judgment at law, with a releaſe of errors, otherwiſe the injunction ought not to be continued; for that the defendant being tenant in tail, it would be of ſome advantage to him to have the legal eſtate; ſo as he might dock the intail, and avoid all the remainders over; and then the plaintiff may have the benefit of his title in equity, and make the moſt of it.

THE COURT. None of the caſes cited at the bar come up to the preſent caſe; for in all thoſe caſes the truſt covered the whole eſtate of the *ceſtui que truſt*, as well as of thoſe in remainder: it is true, the caſe of *Baſket v. Pierce (a)* is ſomewhat like it, which was thus: The teſtator deviſed his lands to truſtees for ninety-nine years for the payment of his debts; and if they did not act, then he deviſed the lands to *T. S.* and his heirs in truſt to pay his debts, and afterwards to *A. B.* in tail, remainder in tail to *E. G.* Afterwards *A. B.* who was the *ceſtui que truſt* in tail, levied a fine, and died without iſſue, and five years paſſed without any claim: it was decreed, that this fine and non-claim barred the remainder-man in tail, for equitable rights are bound by fines as well as actions and titles at law; and though it was inſiſted for the plaintiff in that caſe, that the title of the remainder-man was not yet commenced, becauſe the debts were not paid, and the term for ninety-nine years was ſubſiſting; and that the entire eſtate at law being in the truſtee, he ought to have entered; and that it was againſt equity for him to ſuffer the *ceſtui que truſt* to be barred by a fine and non-claim through his default; yet the Court was ſtill of opinion, that the plaintiff was barred.

It is true, in the principal caſe the mortgagee in fee was a truſtee for the mortgagor, but he is only ſo far a truſtee as he derives under the title of the mortgagor, and hath no relation to the remainder over; and to ſay that the remainder of a legal eſtate ſhall be barred by a recovery ſuffered by a *ceſtui que truſt* of a particular eſtate, is going farther * than ever that point hath been carried; and ſeems to croſs the intention of the ſtatute *De Donis*, for by that ſtatute this remainder is veſted. * [145]

Beſides, this recovery was ſuffered by a *ceſtui que truſt* in tail, which is but a particular eſtate, who at that very time had it in his power to have the legal eſtate, by paying off the mortgage.

It hath been objected, that there was no good tenant to the *præcipe*; but if there had not, it ought to be preſumed that there was a good one after this length of time.

It is true, it induces a ſtrong ſuſpicion that the defendant, who is the remainder-man, thought himſelf barred by this recovery when he brought the ejectment, and declared on a double demiſe, the one made by himſelf, and the other by the aſſignee of the mort-

(a) 1. Vern. 226.

WINTER *againſt* BERMINGHAM.

the houſe of lords, in the caſe of *Blake v. Blake (a)*, *viz.* that a papiſt muſt be accountable for the profits ſince the time of the original purchaſe.

* [147] * SED PER CURIAM, That decree was made upon ſome extraordinary circumſtances, but that the preſent decree ſhould be according to the precedents in this court; and denied to give the plaintiff coſts (*b*), for that it was hardſhip enough for him to loſe the lands.

(*a*) 2. Eq. Abr. 621. 2. Brown. P. C. 587.

(*b*) When coſts ſhall be given, ſee 2. Com. Dig. "Chancery" (2. W.).

EASTER

EASTER TERM,

The Eleventh of George the Firſt,

IN

The Court of Chancery.

Sir Robert Raymond, *Knt.*
Sir Jeffery Gilbert, *Knt.* } *Lords Commiſſioners.*
Sir Joſeph Jekyll, *Knt.* *Maſter of the Rolls.*

Boothby *againſt* Matthew Vernon. Caſe 67.

UPON A BILL IN CHANCERY to ſet aſide a conveyance which was obtained by fraud, and for a reconveyance of the eſtate;

Deviſe to the wife for life, remainder to the iſſue male of her body, and to the heirs male of ſuch iſſue male, remainder over; ſhe had iſſue a ſon, who died in her life-time, and then ſhe died; but ſhe being heir at law to the teſtator, the reverſion in fee deſcended on her. Decreed, that her huſband ſhall not be tenant by the curteſy.

S. C. 2. Eq. Ab. 727.

The caſe was: *Sir Harry Boothby*, by his laſt will, deviſed the lands in queſtion "to his ſiſter *Anne Boothby*, and her aſſigns, for "her life; and that if ſhe married and had iſſue male of her body "living at the time of her death, then to ſuch iſſue male, and to his "heirs males for ever; but if ſhe died leaving no iſſue male at "the time of her death, then to *George Boothby* and his heirs for "ever." *Sir Harry Boothby*, ſoon after making this will, died without iſſue, and the ſaid *Anne*, who was his ſiſter and heir, entered, and married with the defendant *Vernon*, by whom ſhe had iſſue a ſon and a daughter; then *Anne* died, and afterwards the daughter died, and the ſon ſurvived, who afterwards died; and the plaintiff *Mr. Boothby* is heir at law both to the ſaid teſtator and *Anne*; but the defendant, and one *Young* an attorney, fraudulently obtained a conveyance of this eſtate, which was of the value of ſeven hundred pounds a-year, in conſideration only of fifty guineas.

THE MASTER OF THE ROLLS, upon the hearing of this cauſe before him, decreed, that the defendant ſhould reconvey all his right to the ſaid lands to the plaintiff, and that the conveyance which he had thus obtained by fraud ſhould be cancelled and deſtroyed.

BOOTHBY *againſt* MATTHEW VERNON.

And now upon a petition for a rehearing before RAYMOND and GILBERT, *Lords Commiſſioners*, IT WAS INSISTED *for the defendant Mr. Vernon*, that though he took this conveyance knowing it to be fraudulently obtained by his attorney, and ſo was guilty of imputative fraud, yet that cannot be any ground to take away any right from him which he had before that conveyance * was executed; and a right he had *(viz.)* to be tenant for life by *the curteſy of England*, becauſe his wife was ſeiſed of the inheritance during the coverture. It is true, it is determined by her death, but it is not neceſſary the eſtate ſhould continue after her death to make the huſband tenant by the curteſy, if ſhe was ſeiſed of the inheritance in her life-time, which by poſſibility might have continued after her death. And of ſuch an inheritance ſhe was ſeiſed before and after the marriage; for though ſhe had an expreſs eſtate for life given to her by this will, yet there was no immediate remainder which poſſibly could veſt during her life; but the inheritance was limited upon a contingent at her death; and therefore ſhe being heir at law to the teſtator, it muſt deſcend to her till the contingency happen, ſo that ſhe was ſeiſed of the inheritance ſubject to this contingent; and though that inheritance vaniſhed at her death, yet her huſband ſhall be tenant by the curteſy. But if not, yet he hath ſome other rights to this eſtate: as for inſtance, his ſon might take the reverſion in fee by purchaſe under this will; and if ſo, then the heirs *à parte paternâ* will have a title; but if the ſon took by deſcent, it is otherwiſe; and it is probable, the defendant may have ſome other demands which he may juſtly make to thoſe lands; therefore, though this conveyance was got by his attorney by fraud, and this may be a fault in him by imputation, yet there is no reaſon to oblige him to reconvey all his right to the plaintiff. Therefore the fee deſcending on her even before ſhe married or had iſſue, and her eſtate for life being not merged by the deſcent of the fee, her huſband ſhall be *tenant by the curteſy*; and ſo is the caſe of *Plunket v. Holmes* (*a*), *Archer's Caſe* (*b*), and the caſe of *Loddington v. Kime* (*c*); and the caſe of *Carter v. Barnardiſton* (*d*) was exactly the ſame caſe as *Loddington v. Kime*, which received the ſame determination in the houſe of lords. All which caſes plainly prove, that the reverſion or fee-ſimple does deſcend to the heir at law, though there is an *hiatus* or opening for the interpoſition of the contingent remainders when they happen. In the caſe of *Pureſoy v. Rogers* (*e*), the fee deſcended to the heir till a contingency happened. By the deſcent of the fee to the deviſee *Anne*, ſhe was ſeiſed of the fee; and whenever a *feme* is ſeiſed of a fee-ſimple at any time during marriage, and has iſſue and dies, her huſband ſhall be tenant by the curteſy, even though ſhe be afterwards diſſeiſed, or the ſame land be recovered againſt her. Whether the fee-ſimple deſcended to

* [148]

4. Mod. 284.
1. Lev. 39.
3. Keb. 11. pl 15.
3. Salk. 299. pl 5.
Pollexf. 481.

(*a*) 1. Lev. 11. 3. Saund. 389.
(*b*) 1. Co. Rep. 66.
(*c*) 3. Lev. 431. 1. Salk. 224.
(*d*) 1. Peer. Wms. 505.
(*e*) 2. Saund. 380.—See 2. Bac. Abr. 74. 4. Bac. Abr. 315.

the

the heir at law, was the very queſtion in the caſe of *Carter v. Barnardiſton (a)*. It will be ſomething odd if the huſband ſhould not be tenant by the curteſy, ſince the plaintiff claims theſe lands in virtue of the ſeiſin in fee of *Anne Boothby*. So that this decree being, that the defendant ſhall reconvey generally, without reſerving to him that eſtate for life which he had by the curteſy, for that reaſon it ought to be reverſed. * There is another reaſon likewiſe why it ought to be reverſed; and that is, it being a point of law whether the defendant is tenant by the curteſy, or not, that point ought not to be determined in a court of equity without a trial at law.

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* [149]

YORKE, *Attorney General*, INSISTED *for the plaintiff*, that a reconveyance was abſolutely neceſſary, becauſe the plaintiff can never recover (having conveyed the legal eſtate to the defendant) until he have a reconveyance; and it is not ſufficient to ſet aſide the deed as fraudulently obtained; for if the plaintiff ſhould bring his action at law, and the defendant ſhould give this deed in evidence, it cannot be avoided by pleading the fraud and giving that in evidence; ſo that a reconveyance being neceſſary, the queſtion will be, what ſort of conveyance. And certainly it muſt be a reconveyance without reſerving any eſtate for life to the defendant as *tenant by the curteſy*; for though it is a point in law whether he is ſo or not, yet the Court who made this decree did not determine it without referring it to the court of common pleas, for the opinion of the Judges of that court, and they certified that he was not *tenant by the curteſy*. However, though it is a point in law, it is a point incidently ariſing on a cauſe proper for the juriſdiction of a court of equity; and ſuch points have often been determined in this court. Now after a queſtion in law referred to the opinion of the Judges is by them certified to this court, it is very unuſual to ſpeak to it again upon the ſame head; for if that ſhould be allowed, it would be in vain to refer caſes in law to the Judges for their opinion, and to certify to this court what the law is. It is true, in the great caſe of the *Duke of Norfolk* (*b*), the *Lord Chancellor* FINCH decreed againſt the opinion of the Judges; and in the caſe of *Gore v. Gore* (*c*), the *Lord Chancellor* MACCLESFIELD ordered the point certified by the Judges to be ſpoke to again before himſelf, upon ſome diſlike of the Judges certificate; and his reaſon was, to give an opportunity that the matter might be finally determined by appeal to the houſe of lords; but the parties agreed. Now as to the point in law, it is clear, that the wife had but an eſtate for life by this deviſe, and that the reverſion in fee deſcended on her; and then the queſtion is, if that is ſuch an eſtate in poſſeſſion that the huſband may be * tenant by the curteſy; and it was argued, that it was not, for it muſt be executed in poſſeſſion, otherwiſe the huſband ſhall not be *tenant by the curteſy*: as where an eſtate is given to two ſiſters and the heirs of their bodies, the

* [150]

Where the huſband ſhall not be tenant by the curteſy.

(*a*) 2. Eq. Abr. 430. 1. Peer. Wms. 505. 2. Brown. P. C. 1.

(*b*) 3. Chan. Caſes, 1. Pollexf. 223.

(*c*) Ante, 4.

huſband

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huſband of her who dies firſt ſhall not be tenant by the curteſy, becauſe the eſtate of the ſurviving ſiſter intervenes (*a*). Anciently, the reverſions of eſtates depending upon contingencies were adjudged in abeyance: as if a leaſe for life be made, remainder to the right heirs of *J. S.* the fee-ſimple was held to be in abeyance till *J. S.* died (*b*). But of later years it hath been reſolved, that there ſhall be ſome kind of deſcent in the mean time, till the contingencies happen, yet ſo as not to deſtroy them (*c*). The reverſion cannot deſcend in poſſeſſion, and conſequently the huſband cannot be tenant by the curteſy (*d*). Now here the teſtator having deviſed an expreſs eſtate to his ſiſter for life, and limited contingent remainders upon her death, the fee not being veſted in poſſeſſion in anybody muſt remain in himſelf: as where a feoffment is made to *T. S.* for life, remainder to the right heirs of *W. S.* in ſuch caſe, if tenant for life dies before *W. S.* he who made the feoffment ſhall have the fee; and it was the conſtant rule, that where the reverſion came to the tenant for life by the ſame conveyance, there the eſtate for life was not merged; but if it came by operation of law, as by deſcent, or by any different conveyance, there it is merged; and ſo are the caſes of *Wood v. Ingerſole* (*e*), and *Harriſon v. Bell, &c.*

Cro. Jac. 260.

THE COURT. Upon the death of the wife, the contingent eſtate-tail to her iſſue began; ſo that at that time the eſtate was to commence in poſſeſſion, and be conſummate, becauſe her eſtate for life, by which it was to be ſupported, was gone; ſo that the inheritance being never veſted in her during her life, for that reaſon her huſband cannot be *tenant by the curteſy*. And to make this more clear, the intention of the teſtator is to be conſidered. Now it doth not appear, that he had any manner of intention that his ſiſter ſhould have any benefit of the inheritance; if he had, then certainly he having the whole dominion over his eſtate, and who could have moulded it as he thought proper, would have ſhewed, that he intended ſhe ſhould have the inheritance; but there is not the leaſt ſign or badge of any ſuch intention; and if it ſhall be otherwiſe intended by operation of law, that would be an injury done to the intention of the teſtator. Wherever the eſtate is to be determined by expreſs limitation or condition upon the death of the wife, there the huſband ſhall not be tenant by the curteſy: as where an eſtate for life is limited to a woman, remainder to her firſt and every other ſon in tail male, remainder to the heirs of her body, remainder to her right * heirs; here it is plain, that ſhe is ſeiſed of the inheritance; yet if ſhe hath a ſon, her huſband ſhall not be *tenant by the curteſy*, becauſe the contingent eſtate which is to ariſe upon her death intervenes between her eſtate for life and the inheritance. Agreeable with the caſe before mentioned is THE YEAR-BOOK 1. *Edw.* 3. *pl.* 14, 15. which is, Tenant for life,

* [151]

(*a*) 2. Roll. Abr. 90.
(*b*) Co. Lit. 183. a.
(*c*) Co. Lit. 342.
(*d*) Plunket *v.* Holmes, 1. Lev. 11.
(*e*) Vent 345. Cro. Jac. 260.

remainder

remainder in fee, &c.; the tenant for life made a leaſe to him in remainder for ſo many years as he (the remainder-man) ſhould live; then tenant for life died, and ſo did the remainder-man: it was adjudged, that his wife ſhould not be tenant by the curteſy, becauſe the poſſibility which the tenant for life had that the eſtate might revert to him, had barred her of all right of dower.

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45. *Edw.* 3. 16.

For theſe reaſons THE DECREE WAS AFFIRMED, without any allowance on account of the *tenancy by curteſy*; and as to any other legal intereſt the defendant had, he might aſſign it to truſtees, but not to be given in evidence till the plaintiff recovers againſt the defendant; and as to any equitable demand that may be affected by this decree, that the defendant ſhall reconvey without prejudice to ſuch right.

Charles and Others *againſt* Andrews. Caſe 68.

THIS was a bill brought againſt the heir and executors of *John Andrews*, deceaſed, by the plaintiffs, who were his creditors on *ſimple contract*, for an account, and to have their debts paid.

If executors pay ſpecialty debts ſecured on the real eſtate out of the perſonal eſtate of the teſtator, the ſimple contract creditors ſhall have the ſecurities.

S. C. 2. Eq. Abr. 37. 1. Vern. 455. 2. Vern. 273. 763. 2. Com. Dig. "Chancery" (2. G. 4.).

The caſe was thus:

The executors of this *John Andrews* had paid away his perſonal aſſets in ſatisfying debts by ſpecialty, which were a lien at law on his real eſtate; and by the conſtant courſe of this court, where ſuch debts are diſcharged out of perſonal aſſets (as theſe were), in caſe of the lands, then the creditors by ſimple contract ſhall ſtand in the places of the creditors by ſpecialty, to have their debts ſatisfied out of the lands.

And ſo IT WAS DECREED in this caſe, and that the lands ſhould be ſold for that purpoſe; and the heir, who was an infant, to join in a conveyance within ſix months after he comes of age.

* [152]

If a huſband make a ſettlement on his wife in conſideration of a marriage-portion, the wife ſhall be endowed, if it be not expreſsly ſtated in the deed to be "in bar of "her dower."

2. Vern. 365. 3. Atk. 8. 607. 2. Com. Dig. "Chancery" (3. E. 2.).

But as to the ſale of the lands another queſtion aroſe, and that was, that the widow of the ſaid *John Andrews* might keep to that jointure which was ſettled on her before marriage, and relinquiſh her dower, or at leaſt be obliged * to chuſe one, and to relinquiſh the other, and that ſhe might not have both; for though the jointure which ſhe had by her marriage-ſettlement is not expreſſed to be "in bar of her dower," yet it is the rule of this court, that ſhe ſhall not have both.

THE COURT was of opinion, that if ſhe was a party to the ſettlement, and of age at the time of her marriage, and it is expreſſed that her jointure ſhall be in bar of her dower, then ſhe ſhall be barred; but if it is not ſo expreſſed, it ſhall never be averred to be in bar of her dower; and ſo is *Vernon's Caſe* (*a*). And ſo was the caſe

(*a*) Dyer, 317. a. S. C. Bendl. 210. S. C. 4. Co. 1.

* Qu? The averment was allowed in Vernon's caſe.

CHARLES AND OTHERS *againſt* ANDREWS.

caſe of *Lawrence v. Lawrence (a)*, in the houſe of lords, in the year 1717, where it was ſo held, though the ſettlement was in conſideration of a portion in marriage; but it did not appear the parties intended it ſhould be in bar of dower, which is a different conſideration from that of a marriage-portion; therefore nothing but a plain and expreſs intention of the parties ſhall bar the right of dower (*b*). It is true, this Court has gone ſo far as to confine a widow to her election which to take, where a term for years was ſettled on her in jointure in bar of her dower, though no chattel intereſt can bar her dower at law, or within the ſtatute; but in regard ſhe expreſsly conſented to accept ſuch an intereſt for her jointure, this Court would not admit her to have both.

Extravagant bargain not to be carried into execution in a court of equity.

THEN IT WAS INSISTED for one *Atkyns*, who was a creditor by articles made between him and the ſaid *John Andrews* for the purchaſe of part of his lands, that if the creditors upon ſimple contract ſhall now ſtand in the places of the creditors by ſpecialty, that it may be without prejudice to his demand, and that he might have a ſpecific performance of the articles. It is true, the ſaid *John Andrews* ſold the ſame lands to one *Cropp*; but after the articles were executed for ſale thereof to the ſaid *Cropp*, he gave the vendor ſeven hundred pounds for leave to relinquiſh his bargain, and thereupon thoſe articles were made void; by which it appears that it was a very extravagant bargain, for otherwiſe ſo great a ſum would not have been given to relinquiſh it; and it was inſiſted on behalf of the defendants, that an extravagant bargain ought not to be carried into execution in a court of equity,

TO WHICH *it was anſwered*, that *Atkyns*, the purchaſer under
* [153] theſe articles, would likewiſe relinquiſh the ſame upon the * payment of the ſeven hundred pounds to him; for ſince *John Andrews* had got ſo much money by *Cropp*, it was but juſt that *Atkyns* ſhould have that money, or a ſpecific performance of his articles.

And THE COURT was of that opinion.

But in regard the defendant was a minor, and by conſequence could make no election, therefore THE COURT decreed a ſpecific execution of the articles made between *Andrews* and *Atkyns*, for that the ſale thereof by virtue of thoſe articles, and in conſideration of ſo much money to be paid for the purchaſe, was a ſeparate and ſpecific lien on thoſe lands, and this by the conſtant courſe of this court; and for ſo much of the purchaſe-money to be paid as the lands ſhall fall ſhort to anſwer the ſaid *Atkyns*, he ſhall come in as a creditor by ſpecialty on the other lands.

Therefore IT WAS DECREED, that all the lands not ſettled *in* jointure, or which might be in dower to the widow, ſhould be forthwith ſold, and that the infant ſhould join in the conveyance

(*a*) 1. Eq. Abr. 218. 2. Eq. Abr. 386. 2. Freem. 234. 3. Vern. 365. 1. Brown's Caſes Parl. 591.

(*b*) See Tinney *v.* Tinney, 3 Atk. 8. Villa Real *v.* Galway, Co. Lit. 36. b. Pearſon *v.* Pearſon, 1. Bro. C. C. 292.

within

within ſix months after he ſhould be of age, and THE MASTER to take an account of all the debts, and that the ſame ſhall be paid in proportion; and if the lands now to be ſold ſhall not be ſufficient to pay all the debts, then the reverſion of the widow's jointure or dower ſhall come in aid thereof, to ſatisfy what ſhall remain unpaid.

CHARLES AND OTHERS *againſt* ANDREWS.

Soley *againſt* Saliſbury. Caſe 69.

A BILL was exhibited by the creditors of a mortgagor to have the eſtate ſold for the payment of their debts, pending which ſuit the mortgagee obtained a decree to foreclose the mortgagor of the benefit of redemption.

The Court will open the foreclosure, if there be any unfair conduct in the mortgagee.

THE COURT decreed, that the plaintiff ſhould redeem upon payment of the principal and intereſt, and coſts, to the mortgagee, and referred to A MASTER to take an account thereof, and that the land ſhould be ſold to pay the creditors *(a)*.

S. C. 2. Eq. Ab. 600.

(a) See Greſwold v. Marſham, 2. Ch. Caſes, 170. Godfrey v. Chaldwell, 2. Vern. 601.

* Adams *againſt* Clerke. Caſe 70.

A TESTATOR deviſed ſeveral ſpecific legacies to ſeveral perſons; and in particular he deviſed ſpecific legacies to each of his grandchildren, "to be paid at their reſpective ages of "twenty-one years, or days of marriage, which ſhould firſt hap-"pen;" and by a ſubſequent clauſe in his will he appointed, that "all the legacies thereby deviſed ſhall be paid within one year after "his deceaſe."

If legacies be given *inter alia* to children, "to "be paid at "twenty-one, "&c." a ſubſequent clauſe, that "*all* legacies ſhall be "paid within a "year after my "deceaſe" ſhall relate only to the other legacies in the will.

The grandchildren, though under age, and unmarried, exhibited their bill, and inſiſted, that by virtue of this laſt clauſe in the will, their legacies ought to be paid within a year after the death of the teſtator.

THE COURT. The ſubſequent clauſe in this will, which ſeemingly contradicts the payments of the legacies to the grandchildren in point of time, muſt be conſtrued ſo as it may not be repugnant to any former clauſe in the ſame will, and therefore that laſt clauſe muſt only relate to the other ſpecific legacies given to the other legatees, and not to the legacies deviſed to the grandchildren.

S. C. 2. Eq. Ab. 557. 561. 2. Atk. 86. 112. 2. Vezey, 30. 2. Com. Dig. "Chancery" (3. Y. 12.).

Caſe 71.

Hill *againſt* Filkins and his Wife.

A deviſe by *a papiſt* in truſt to *papiſts* of lands "to be ſold for "the payment "of debts and "legacies, and "the reſidue to "be paid to *A.* "*a papiſt*, when "ſhe ſhall attain her age "of twenty-one years, or "be married "with the conſent of the "ſaid truſtees," is a good deviſe, notwithſtanding the ſtatute 11. & 12. *Will.* 3. c. 4. if the deviſee conforms to the proteſtant church within ſix months after ſhe attains the age of eighteen years.

THIS was a bill exhibited by a proteſtant heir for the recovery of lands deviſed in truſt for a papiſt.

THE CASE was as follows: *Anne Stephenſon*, who was grandmother both to the plaintiff and to the defendant's wife, by her laſt will, in the year 1716, deviſed the lands now in queſtion to one *Eyre* and *Buſh*, both papiſts, in truſt, to be ſold for the payment of her debts and legacies; and the reſidue of the money ariſing by ſuch ſale ſhe deviſed to the wife of the defendant, when ſhe ſhould attain her age of twenty-one years, or be married with the conſent of the ſaid truſtees, and appointed them to be her guardians, and ſoon after died. The ſaid guardians ſent the plaintiff, who was then very young, to a popiſh ſchool in *Suſſex*, and the defendant's wife to another popiſh ſchool in *Hammerſmith*.

But *Roger Hill*, their father, who was their guardian by nature, petitioned the *Lord Chancellor* COWPER to have the guardianſhip of his children, or ſome other proteſtant who ſhould be thought proper.

And accordingly an order was made, that they * ſhould be educated in ſome proteſtant ſchool; but before that order could be executed, the defendant intermarried with one *Filkins*, at the chapel of THE EMPEROR's Reſident, by a prieſt, and two days afterwards by a miniſter of the church of *England*.

The defendant confeſſes by her anſwer, that ſhe was a papiſt at the time of making the will, and at her grandmother's death; and for plea ſaith, that the plaintiff was then a papiſt; and that ſhe was at that time under the age of eighteen years; and that before ſhe came to that age, ſhe intermarried with the other defendant *Filkins*, who was then, and now is, a proteſtant; and that ſhe herſelf became a proteſtant, and conformed, within ſix months next after ſhe came to the age of eighteen years, according to the ſtatute in that caſe made and provided; the words of which ſtatute (*a*) are thus: "After 29 *September* 1700, perſons educated "in, or profeſſing, the popiſh religion, who ſhall not within ſix "months after they attain the age of eighteen years take the oaths "of allegiance and ſupremacy, and make and ſubſcribe the "declaration of 30. *Car.* 2. in the courts of chancery, king's "bench, or quarter ſeſſions, ſhall be diſabled (but not their heirs "or poſterity) to inherit, or in any wife to take, any lands, tene-"ments, or hereditaments, within this kingdom; and during the "ſaid perſons lives, the next of kin who ſhall be a proteſtant, "ſhall have and enjoy the ſaid lands until they take the ſaid oaths, "without accounting for the profits received, but not to commit "waſte on penalty of treble damages."—The next clauſe is, "That after the 10th of *April* 1700, no papiſt ſhall purchaſe,

S. C. 10. Mod. 481. 536. S. C. Caſ. in Ch. 22. S. C. 2. Peer. Wms. 6. S. C. 2. Eq. Ab. 622. 624. 2. Stra. 267.

(*a*) 11. & 12. *Will.* 3. c. 4. ſ. 5, 6.

"mediately

"mediately or immediately, any lands, tenements, or hereditaments, within this kingdom, or profits out of the ſame, but all ſuch eſtates or profits out of lands ſhall be void (*a*)."

Then ſhe inſiſted, that the plaintiff had no right, he being a papiſt himſelf at the time of the making this will, and at the death of the teſtatrix.

This being the fact, the ſingle queſtion was, Whether this deviſe of the reſidue to the grand-daughter ſhall be accounted as land, and *a purchaſe* thereof, within the ſtatute? for if it is, then it is void, and the eſtate will *deſcend* to the plaintiff as heir at law (*b*).

And as to that point it was ſaid for the plaintiff, that to deviſe lands for payment of debts, and the reſidue of the * money ariſing by the ſale thereof to be paid to a papiſt, this reſidue ſhall be taken as lands, and is a purchaſe thereof within this act, and therefore cannot be taken by a papiſt; and ſo it was reſolved in the houſe of lords, in the caſe of *Roper v. Radcliffe* (*c*); for otherwiſe, ſince nobody elſe could have any intereſt therein, ſuch papiſt might pay the debts and legacies, and enjoy the lands, and by this means the ſtatute would be eluded which was made to prevent their taking lands. * [156]

THE COUNSEL *for the defendant* admitted, that a deviſe of the reſidue (as in this caſe) was a purchaſe, and within the ſecond clauſe of this ſtatute; but yet that the defendant was entitled to have an execution of this truſt, for that this ſtatute had two views: one was to hinder papiſts from enlarging their landed intereſt; the other was to invite them to conform; and the age of eighteen was accounted a proper period for them to make their election whether they would conform or not. Therefore a deviſe to a papiſt under the age of eighteen years is good, if he conform within ſix months after he comes to that age; otherwiſe the words in the ſtatute which directs when that conformity ſhall be made are in vain (*d*); and though he did not conform at the time appointed, yet the inheritance veſted in him, and ſhall deſcend to his heirs, and he ſhall maintain an action of waſte by virtue of the ſtatute againſt the next proteſtant heir, who is entitled to take the profits during the diſability. And though the defendant's wife was bred a papiſt, and profeſſed the popiſh religion both at the time of the deviſe and at the death of the teſtatrix, and likewiſe at the time of her marriage, yet ſhe became a convert before ſhe was of the age of eighteen years, and had done all which is required by the act, and ſo is capable to take and enjoy the eſtate.

(*a*) See 18. *Geo.* 3. c. 60. 1. Hawk. P. C. 7th edit. ch. 15. ſ. 5.

(*b*) Hawkins v. Chappel, 1. Atk. 622. Davers v. Dewes, 3. Peer. Wms. 46.

(*c*) Poſt. 167. 181. 10. Mod. 230. 1. Bro. P. C. 450.—See alſo Davers v. Dewes, 3. Peer. Wms. 46. Carrick v. Errington, 3. Peer. Wms. 362.

(*d*) 3. Peer. Wms. 47.

And

HILL *againſt* FILKINS AND HIS WIFE.

And THE COURT was of this opinion; and therefore decreed the truſtees to perform the truſt.

N. B. On a rehearing before the *Lord Chancellor* KING, the bill was diſmiſſed with coſts.

* [157]

Caſe 72.

* Robert Barker *againſt* Giles and Smith.

Friday, 4th June.

A deviſe of "all "my real and "perſonal e- "ſtate to *A.* "in truſt to "pay debts and "legacies, the "reſidue to be "laid out in "lands to the "uſe of *B.* and "*C.* and the "*ſurvivor* of "them, their "heirs and aſ- "ſigns, for e- "ver, *equally to* "*be divided* be- "tween them, "ſhare and "ſhare alike," creates a joint-tenancy.

8. C. Caſ. in Ch 35.
S. C. 2. Eq. Ab. 536.
S. C. 2. Peer. Wms. 280.
S. C. 3. Bro. P. C. 297.
See Burn's Eccl. Law, 554.

THIS was a bill brought by a ſurviving legatee to have an execution of a truſt.

THE CASE was as follows: *Robert Barker*, ſeiſed in fee of the lands in queſtion, by will deviſed "all his real and perſonal eſtate "to, &c. in truſt to ſell the ſame, and thereout to pay his debts "and legacies; and the reſidue (if the ſame amounted to no more "than four hundred pounds) to be laid out in lands to the uſe of "*A.* for life, remainder to *Robert Barker* his nephew in fee; "and the ſurplus above four hundred pounds to be alſo laid out in "lands to the uſe of the teſtator's nephews *Jerom Barker* and "*Robert Barker*, and the ſurvivors and ſurvivor of them, their "heirs and aſſigns for ever, *equally to be divided* between them, "ſhare and ſhare alike."

This will was made in the year 1716, and about four years afterwards the teſtator died, and left a conſiderable perſonal eſtate ſufficient to pay all his debts and legacies; but *Jerom Barker*, one of the legatees, died in the life-time of the teſtator.

And now the plaintiff, as ſurviving legatee, exhibited this bill againſt the executors and heir at law of his uncle *Robert*, to have an account of the real and perſonal eſtate of the ſaid teſtator, and to have conveyance of the real eſtate.

The truſtees by their anſwer ſubmitted to account, and to execute the truſt out of the reſidue of the eſtate, after debts and legacies paid.

THE QUESTION was, How this truſt ſhould be executed? for that the heir at law to the teſtator claimed a moiety of the eſtate by deſcent; and this depending upon the conſtruction of this will, what eſtate the legatees took by this deviſe; for if it was a *tenancy in common*, and one of them dying in the life-time of the teſtator, then his moiety will deſcend to the heir at law, as undiſpoſed by the will: but if they were joint-tenants, then the whole ſurvives to the plaintiff.

LUTWYTCH, COWPER, and TALBOT, *for the plaintiff*, inſiſted, that this was a *joint-tenancy*, it being in a will where the intention of the teſtator is to govern, and where artificial reaſoning is not to be admitted againſt it; and that nothing but an expreſs intention, or a neceſſary implication of ſuch intention, ſhall create a *tenancy in common* in a will which would not create ſuch a tenancy

tenancy in a deed. It has formerly been doubted, whether the words "equally to be divided" would make a tenancy in common in a will. *Ratcliffe's Caſe* (*a*) is the firſt caſe to that purpoſe, and was reſolved by reaſon of the intention of the deviſor, they not being proper words in law for that purpoſe, for they do not create a tenancy in common in a deed even at this day. The caſe of *Fiſher v. Wynne* (*b*), in HOLT's time, was a deviſe of copyhold lands to the deviſor's two daughters, equally to be divided between them, their heirs, and aſſigns; and the Court was divided in opinion: but HOLT, *Chief Juſtice*, held the deviſe to be a *joint-tenancy*, for that all the words might be fulfilled by a *joint-tenancy*, and they do not import a ſeveral freehold. In the caſe of *Bliſſet v. Cranwell* (*c*), the reaſon for that judgment, as given in the books (*per* TALBOT), does not ſupport it, and (*per* LUTWYCH) is not law. * Now it is plain, theſe words would not make a * [158] *tenancy in common in a deed* (*d*); therefore if ſuch a tenancy is made by this will, it muſt be by implication; but expreſs words in the ſame will ſhall never be rejected to make room for an implication, as the word "ſurvivor" muſt in this caſe, if this is a tenancy in common by the ſubſequent words "equally to be "divided between them;" it being firſt deviſed to them, and the ſurvivor and their heirs, in expreſs terms. It may be objected, that if both the legatees had ſurvived the teſtator, they would have been *tenants in common*; but by the word "ſurvivor," the teſtator intended a proviſion, that if either ſurvived, he ſhould have the whole; and that if both ſurvived, they ſhould take by moieties. Now in this caſe, the legal eſtate being in truſtees, the heir at law can have no pretence that a moiety deſcends to him as undiſpoſed; therefore by theſe words in the will the legatees were joint-tenants; and ſo it hath been reſolved in parallel caſes: as for inſtance, where the teſtator deviſed lands to *Jane* and *Elizabeth* during life, "equally to be divided," remainder to the right heirs of *Jane*; this was adjudged a joint-tenancy for life (*e*). *Trin.* 6. *Anne*, *Twickerman v. Jefferies*. So a deviſe to two, "equally to be "divided between them, to have and to hold to them and the "ſurvivor of them," was adjudged a joint-tenancy (*f*). So a deviſe "to his executors, and to the ſurvivor of them," was held a joint-tenancy (*g*). So where lands were deviſed to two daughters, "equally to be divided, and to the ſurvivor of them, and to the "heirs of the body of ſuch ſurvivor;" this was adjudged a joint-tenancy, and not a tenancy in common (*h*). Now by the words of this will, the truſtees are directed to convey the lands to the

(*a*) 3. Co. 39.—See alſo Dyer, 25. a.

(*b*) Comy. Rep. 88. 1. Ld. Ray. 622. 1. Salk. 391. 3. Salk. 206. 12. Mod. 296. Holt, 369. Lilly's Ent. 205. 1. Peer. Wms. 14. 2. Eq. Abr. 595.

(*c*) 3. Lev. 373. Salk. 226. Comb. 256.

(*d*) Dyer, 25.—But ſee Gaſkin v. Gaſkin, Cowper, 660, Rigden v. Vallier, 2. Vezey, 252. 3. Atk. 371. Goodtitle v. Stokes, 1. Wilſ. 341.

(*e*) Twickerman v. Jefferies, Trinity Term, 6. *Anne*.

(*f*) 2. Roll. Abr. 90.

(*g*) 11. Mod. 108.

(*h*) Stiles, 211.

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legatees, and to the ſurvivor of them, and his heirs; therefore the heir at law ſhall take nothing by deſcent, this being an executory truſt, and the legal eſtate veſted in the truſtees. There is a difference between an *immediate deviſe* and an *executory truſt*; for where any-thing is executory, the Court will conſider the intention (*a*). Farther, by a deviſe "to two and their heirs," they are joint-tenants (*b*). So a deviſe to two, without ſaying more, they are joint-tenants by implication (*c*); but in this caſe, the teſtator has forbidden ſuch an implication by his comment on the deviſe in theſe words "equally to be divided;" and the word "ſurvivor" explains his intention to break the deſcent to the heir
* [159] at law, and is a conveyance to carry the eſtate entirely * to the ſurvivor; for otherwiſe that word muſt be rejected, which could never be the intention of the teſtator. And this was the opinion of one of the lords commiſſioners.

WEARG, *Solicitor General, for the defendant*, argued, that there is no difference in this caſe between an immediate deviſe and an executory truſt; for it depends now only on the words of the limitation (*d*). In 2. *Roll. Abr.* 90. the limitation is expreſs, "to the heirs of the body of the ſurvivor." So in *Twickerman v. Jefferies* (*e*), and *Bale v. Coleman* (*f*), a deviſe of lands, though executory, was conſtrued in the ſame manner as an immediate deviſe. In that caſe, after debts and legacies paid, the reſidue of the perſonal eſtate was to be laid out in the purchaſe of lands to be ſettled to the uſe of *A.* for life, remainder to the heirs of his body; and COWPER, *Chancellor*, on the firſt hearing, was of opinion, that in a court of equity this ſhould be conſidered as an eſtate for life, remainder in tail; but HARCOURT, *Chancellor*, on a rehearing, thought there ought to be no difference, in point of conſtruction, between a court of equity and a court of law: to which COWPER
Cro. Eliz. 313. afterwards agreed. 2. *Vent.* 365. *Style*, 434. As the heir at
pl. 5. law is favoured in all courts, if any accident in point of fact ſhould ariſe between the inception and conſummation of a will (as it did in this caſe between the making the will and the death of the teſtator) to favour his right, in ſuch caſe he ſhall take. Now it is allowed, that if both the legatees had ſurvived the teſtator, in ſuch caſe they would have taken by moieties; therefore if one of them die in the life-time of the teſtator, his moiety ſhall deſcend to the
Style, 434. heir at law, as undiſpoſed by the will; and as in a deviſe to two the
3. Lev. 373. word "ſurvivor" is implied, therefore the expreſſing that word is of no weight, becauſe if it had not been expreſſed it would have been implied; but if both the legatees had died in the life-time of the teſtator, then his heir would have been entitled to the whole, and ſo he is to a moiety. And this was the opinion of the other lord commiſſioner.

(*a*) 1. Peer. Wms. 143.
(*b*) Littleton, ſect. 283, 284.
(*c*) Litt. ſect. 281.
(*d*) Draper's Caſe, 2. Chan. Caſes.
(*e*) Caſes Tem. Holt, 370. 11. Mod. 108.
(*f*) 8. Viner. Abr. 265. 2. Vern. 670. 1. Peer. Wms. 142. 2. Peer. Wms. 473.

KING,

KING, *Lord Chancellor.* This deviſe is to be conſidered as a deviſe of a real eſtate. The rule of conſtruction of wills in this court is the ſame as in the courts of law, *viz.* according to the teſtator's intention appearing by the words of the will, as far as conſiſtent with the rules of law: and every word that can have a conſtruction conſiſtent with law ought to be retained. Had this been an expreſs deviſe, it had been a *tenancy in common* (*a*); the meaning of the words muſt be invariable, and cannot be altered by the accident of one of the parties dying. A deviſe to two and their heirs is a *joint-tenancy.* If a deviſe be to *A.* for life, remainder to *B.* in fee, and *A.* dies living the teſtator, *B.* ſhall take immediately. The teſtator's intent when he made the will was, that the heirs of both his nephews ſhould take. By the act of God, here is a determination of his intention as to one. If the deviſees are *joint-tenants* for life, with ſeveral inheritances, all the words of the will may be well conſiſtent, which cannot be by any other conſtruction; and if ſo, the plaintiff will be entitled to the whole for life (*b*); and after his death his heir to one moiety, and the heir at law of the teſtator to the other moiety, by the lapſe.

Wherefore he made a decree accordingly (*c*).

Which decree was affirmed in the houſe of lords, with an addition, that the appellant may be at liberty to apply to the court of chancery for the profits of the real eſtate, in caſe the perſonal eſtate ſhall not be ſufficient to pay the debts and legacies (*d*).

(*a*) That land deviſed to two *equally*, or *equally to be divided*, creates a *tenancy in common*, ſee Prince *v.* Heykin, 1. Atk. 493. Owen *v.* Owen, 1. Atk. 494. Heath *v.* Heath, 2. Atk. 122. Goodtitle *v.* Stokes, 1. Wilſ. 341. Gaſkin *v.* Gaſkin, Cowp. 660. Stratton *v.* Beſt, 2. Brown. C. C. 233. Jolliffe *v.* Eaſt, 3. Brown. C. C. 25. Campbel *v.* Campbel, 4. Brown. C. C. 15.

(*b*) See Pring *v.* Clay, 2 Ch. Rep. 387. Humfries *v.* Taylor, Amb. 136. Dowſet *v.* Sweet, Amb. 175. Frewen *v.* Rolfe, 3. Brown. C. C. 220. Baldwin *v.* Johnſton, 3. Brown. C. C. 455.

(*c*) See Burdon *v.* Suffolk, 1. Peer. Wms. 96. Stringer *v.* Phillips, 1. Eq. Abr. 292. Trod *v.* Downes, 2. Atk. 304. Roſe *v.* Hill, 3. Burr. 1881. Perkins *v.* Baynton, 1. Brown. C. C. 118. Armſtrong *v.* Eldridge, 3. Brown. C. C. 215. Wilſon *v.* Bailey, 5. Bro. P. C. 388.

(*d*) 3. Brown's Caſes in Parl. 297.

The 6th February, 1719,

IN

The Houſe of Lords.

Thomas *Lord* Parker, *Lord Chancellor.*

Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* John Trevor, and other the younger Children of Sir John Trevor, Appellants; *[161] Caſe 73.

AND

Edward Trevor, Eſq. Son and Heir of Sir John Trevor, late Maſter of the Rolls, Reſpondent.

SIR JOHN TREVOR, by articles dated the twenty-third *October* 1669, in conſideration of a marriage then intended to be had between him and *Jane Puleſton*, the widow of *Roger Puleſton*, and of the affection he did bear to the ſaid *Jane*, *&c.* did covenant with *William Saliſbury*, *Eſq.* and *Sir Richard Lloyd* (truſtees therein named), and their heirs, before the end of two years then next enſuing, to ſettle and aſſure to them and their heirs, as their Counſel ſhould direct, all that the capital meſſuage called *Brynkinalt*, and other lands therein mentioned in the counties of *Denbigh* and *Salop*, being the ancient ſeat of the family, and all the eſtate he then had, either in *England* or *Wales*, about the yearly value of two hundred and fifty pounds, to the ſeveral uſes in the ſaid articles mentioned, *viz.* to the uſe of the ſaid *Sir John* for life, of the body of ſuch heirs male, with remainder to his own right heirs, and that he ſhould ſtand ſeiſed to the ſaid uſes until a ſettlement ſhould be made, and then, without making the ſettlement, levies a fine, and afterwards declares different uſes, and dies, leaving a large eſtate to deſcend to his eldeſt ſon, to whoſe uſe no part of the eſtate was declared under the fine, EQUITY will decree *a ſettlement* to be made purſuant to the uſes declared in the *marriage-articles*.—S. C. 14. Viner. Abr. 572. S. C. 1. Eq. Abr. 387. S. C. 10. Mod. 436. S. C. 1. Peer. Wms. 628. S. C. 2. Eq. Ab. 475. 505. S. C. 2. Bro. P. C. 392. S. C. 10. Viner Abr. 247. 260. 291. S. C. 13. Viner. Abr. 374. 572. 282. 285.

If A. in conſideration of marriage, covenant to ſettle his eſtate, within two years, to the uſe of himſelf for life, without impeachment of waſte, with remainder to his wife for life, remainder to his heirs male in tail ſpecial, remainder to the heirs

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" without impeachment of waſte; then to the uſe of the ſaid *Jane* " for life; and after her death, to the uſe of the heirs males of the " body of the ſaid *Sir John*, on the body of the ſaid *Jane* to be " begotten, and to the heirs males of ſuch heirs males lawfully " iſſuing; and for default of ſuch iſſue, to the uſe of the right heirs " of the ſaid *Sir John Trevor* for ever."

*[162] * And for a farther ſtrengthening the ſaid articles, *Sir John* did thereby covenant, that if the uſes and limitations therein were not well raiſed, according to the intent and meaning of the ſaid articles, that he and his heirs would ſtand and be ſeiſed of the premiſes until ſuch time that a farther aſſurance thereof ſhould be made, to ſuch uſe and uſes as are therein before declared.

The marriage took effect, and *Sir John* had iſſue by the ſaid *Jane* the reſpondent *Edward*, his eldeſt ſon and heir, born the fifth of *November* 1670, and *John*, *Arthur*, *Tudor*, *Prudentia*, and *Anne*, now *Lady Middleton*, the appellants.

But no ſettlement was made purſuant to the aforeſaid articles; and *Sir John* and his lady (having ſome prejudice againſt *Edward*, the eldeſt ſon) levied two fines of the lands compriſed in the ſaid articles, in the year 1692, unto *Sir John Wynn* and *Edward Vaughan*; and about ſeven years afterwards, *viz.* 29 *September* 1699, they did by deed declare the uſes of the ſaid fines to *Sir John* for life, then to the ſaid *Jane* for life, and after their death, then to *John* his ſecond ſon, and the heirs males of his body, with the like remainders over to *Arthur* and *Tudor Trevor* ſucceſſively, remainder to his two daughters, *Prudentia* and *Anne*, and the heirs of their bodies, remainder to the right heirs of *Sir John Trevor* for ever.

And as an inducement to levy the ſaid fines, and to declare the uſes thereof, as in the ſaid deed is mentioned, ſeveral acts of undutifulneſs were therein recited (but none proved in the cauſe), and alſo the marriage of the ſaid *Edward* with one *Mary Stains*, againſt his father's conſent (who was proved to be born and bred a gentlewoman, and of a ſober and virtuous behaviour), which marriage was not until ſix or ſeven years after the ſaid fines were levied; and it was alſo recited in the ſaid deed, that if the ſaid *Edward* ſhould have the lands compriſed in the ſaid articles, then *Sir John* and his lady would be enabled to make proviſion for the younger children.

Sir John Trevor, when he executed the ſaid deed to lead the uſes of the ſaid fines, was ſeiſed in fee of ſeveral other lands (which he purchaſed ſince his marriage), of the yearly value of ſix hundred pounds and upwards; and being ſo ſeiſed, he and the ſaid *Jane* did, by leaſe and releaſe, and fines levied, ſettle the ſame, together with
*[163] other lands which * were the inheritance of the ſaid *Jane*, to the uſe of himſelf and the ſaid *Jane* for their lives, remainder to *John* their ſecond ſon in tail male, remainder in tail to his other children, as in the former ſettlement.

Afterwards

Afterwards *Sir John* purchaſed other eſtates in fee, which upon his death deſcended on *Edward* his eldeſt ſon and heir; and alſo ſome ſmall parcel of land compriſed in the ſaid articles, which were not ſettled by the deed in *September* 1699.

The *Lady Trevor* died in *Auguſt* 1704; and *Sir John* died inteſtate 20th *May* 1717; and afterwards ſome diſputes ariſing amongſt his ſaid ſons and daughters concerning his real and perſonal eſtate, and who ſhould adminiſter, a commiſſion of inſpection was awarded; and upon the execution thereof, the ſaid articles were found in a ſmall trunk with ſome jewels of value, which *Sir John* had depoſited in the hands of one *Evan Lloyd* for ſafe cuſtody; and then *Edward Trevor* the reſpondent got a copy thereof.

After the death of *Sir John*, his ſecond ſon *John* entered on the lands compriſed in the ſaid articles, under colour of the ſettlement in *September* 1699, and he and his brother *Arthur Trevor* (who was adminiſtrator to his ſaid father) got into their hands all the deeds and writings of all his eſtate.

Thereupon the ſaid *Edward* exhibited a bill in chancery in *October* 1717 againſt all the now appellants and others; and amongſt other things prayed, that the ſaid articles might be brought into court, and to have *a ſpecific performance* thereof, and a conveyance made, as therein mentioned.

THE DEFENDANTS put in their anſwer, in which *Arthur*, the adminiſtrator, confeſſed, that the ſaid articles were in his poſſeſſion; and they all inſiſted, that the ſame ought to be conſidered as a complete ſettlement; and that *Sir John* their father had thereby an eſtate-tail, which by their fines in 1692, and by the deed to lead the uſes thereof in *September* 1699, was docked, and the lands veſted in the ſecond ſon *John Trevor* in tail male, with remainders over; but if the ſaid articles ſhould be looked on as executory, and as an agreement for a farther conveyance or ſettlement, in ſuch caſe *Edward* the reſpondent had other lands deſcended on him from his father of a far * greater value than thoſe compriſed in the ſaid articles, beſides his ſhare of the perſonal eſtate, which ought to be taken as a ſatisfaction for the lands agreed to be ſettled on him by the articles; and for that reaſon he ought not to have a ſpecific performance thereof. * [164]

Upon hearing this cauſe in *June* 1719,

THE LORD CHANCELLOR (*a*) decreed, that *John Trevor*, and all the defendants, ſhould execute conveyances of all the lands compriſed in the ſaid articles, and which were by the deed twenty-ninth *September* 1699 ſettled or conveyed to the defendant *John Trevor* (with ſuch remainders over as therein are mentioned), to the uſe of *Edward Trevor* the reſpondent, and the heirs males of his body, with the like remainders to *John* the ſecond ſon, and to

(*a*) Lord Parker.

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Arthur and *Tudor* ſucceſſively in tail male, remainder to *Prudentia* and *Anne*, and the heirs of their bodies, remainder to the right heirs of *Sir John Trevor* for ever.

And as to the other lands in the ſaid articles, which came to the ſaid *Edward* by deſcent from his father, that the ſaid *Edward* ſhould convey them to the uſe of himſelf and the heirs males of his body, with the like remainders over to the defendants *John*, *Arthur*, and *Tudor Trevor* ſucceſſively, remainder to the right heirs of *Sir John Trevor* for ever; and for that purpoſe, that the parties ſhould levy and ſuffer ſuch fines and recoveries as the caſe ſhould require, but at the charges of *Edward Trevor*.

Which decree the reſpondent by his Counſel inſiſted to be juſt, for the reaſons following:

FIRST, For that by the ſcope of *the articles*, they were never deſigned to be a ſettlement, being only a bare agreement how, and to what uſes and purpoſes the lands therein compriſed ſhould be ſettled: for by the firſt part thereof *Sir John* did covenant, within two years, to ſettle and aſſure the ſaid lands to the truſtees and their heirs, as they and their Counſel ſhould direct, to the ſeveral uſes in the ſaid articles mentioned, and alſo in the ſaid ſettlement, as ſhould be agreed on, &c. *viz.* "to *Sir John* and his aſſigns for "life, without impeachment of waſte; and after his death, then to "the ſaid *Jane* for life; and after her deceaſe, to the heirs males "of the body of *Sir John* on the body of the ſaid *Jane* to be "begotten, &c."

* [165] * Nor can the *covenant to ſtand ſeiſed*, in the latter part of the articles, be taken as a final ſettlement, from the very words and precedent part thereof; for it is only proviſional, and to ſtand in force till a ſettlement ſhould be made in form, and ſuch a ſettlement which would anſwer the intention and agreement of the parties.

Neither can it be preſumed, that *Sir John* ſhould have a greater eſtate than for life; nor that it ſhould be in his power to defeat his heir male of that proviſion and eſtate which by the articles were intended to be made for him, becauſe the articles were founded upon the conſideration of his marriage, and of the affection he did bear to his intended wife, and to the heirs males of their bodies to be begotten; ſo that the conſideration extends as well to the iſſue male of that marriage as to the wife. Beſides, the eſtate is expreſsly limited to *Sir John* for life, without impeachment of waſte, which would have been in vain if he had been tenant in tail, becauſe in ſuch caſe he would have been diſpuniſhable of waſte.

Moreover, the lands are directed to be limited after his death, and after the death of his intended wife, to the uſe of the heirs males of their bodies to be begotten, and to the heirs males of the body of ſuch heirs males iſſuing; ſo that the firſt words are only a deſcription of the perſons who are to take, *viz.* "the firſt and "other ſons, &c.;" and the ſubſequent words ſhew what eſtate they were to take, *viz.* "to the heirs males of their bodies."

Now

Now theſe articles could not be effectually performed without limiting the eſtate over to truſtees to preſerve contingent remainders, and in ſuch manner, that it might come to the firſt and other ſons of that marriage, and could never be intended to give a power to *Sir John* to defeat his lady of her eſtate for life, or the firſt and other ſons of that marriage from taking it after the death of the ſurvivor; nor can it be preſumed, that the truſtees would have agreed to ſuch a ſettlement.

As to the point inſiſted on by the defendants, that the reſpondent *Edward* hath received a full recompence and ſatisfaction for that eſtate which he was to have by *the articles*, by his father's ſuffering his *Iriſh* eſtate to deſcend to him, this is altogether immaterial (*a*), becauſe *Edward*, the eldeſt ſon, doth not come for ſatisfaction or recompence by way of damages, which is quite out of the caſe, but he claims a right as a purchaſer to the ſpecific lands and * tenements compriſed in the marriage-articles, and deſires that the ſame may be ſettled purſuant thereunto; and that againſt the defendants, who now claim under a voluntary conveyance made to defeat thoſe articles; which conveyance was not made in favour of younger children who had no other proviſion, for they were otherwiſe plentifully provided for, the ſaid *John Trevor*, the ſecond ſon, having an eſtate of ſix hundred pounds a-year by the ſettlement in *October* 1699, and there being an ample proviſion for the reſt by the reſpective ſhares of the perſonal eſtate of their father.

* [166]

After a long debate, the decree was affirmed (*b*).

(*a*) See Wilcox v. Wilcox, 2. Vern. 558. Bland v. Widmore, 1. Peer. Wms. 342. Letchmere v. Earl of Carliſle, 3. Peer. Wms. 224.

(*b*) 2. Brown's Caſes in Parl. 122.—See alſo Jones v. Laughton, 1. Eq. Caſes Abr. 392. Nandick v. Wilkes, 1. Eq. Caſes Abr. 393. Cuſack v. Cuſack, 1. Bro. P. C. 470. Weſt. v. Eriſey, 2. Peer. Wms. 350. Robinſon v. Hardcaſtle, 2. Term Rep. 252. Highway v. Banner, 1. Brown. C. C. 584.

The

The Firſt of May 1714,

IN

The Houſe of Lords.

Caſe 74.

* Edward Roper, Eſq. Appellant;

AND

Thomas Radcliffe and William Conſtable, Two of the Executors of John Roper, Eſq. deceaſed, Reſpondents.

THE RESPONDENT'S CASE.

JOHN ROPER being ſeiſed in fee of ſeveral manors, lands, and tenements, in the counties of *Cornwall*, *Glouceſter*, and *Monmouth*, did, by leaſe and releaſe dated the ſeventeenth and eighteenth days of *January*, in the year 1708, grant and convey the ſame to the reſpondents, *William Conſtable*, *Richard Snow*, *Daniel Hickman*, and their heirs, in truſt to ſell the ſame, and out of the money to be raiſed by ſuch ſale, and out of the rents and profits until ſold, to pay a debt of four thouſand pounds to *Heſther* and *Elizabeth Walden*, due to them by a mortgage of the premiſes, with intereſt; and after the ſaid principal ſum and intereſt were paid, then in truſt to them for the payment of ſeveral debts mentioned in A SCHEDULE to the ſaid deed of releaſe annexed; and the ſurplus of the ſaid money to be paid to ſuch perſon or perſons as the ſaid *John Roper*, by writing under his hand atteſted, &c. or by will, ſhould appoint; and in default of ſuch appointment, then in truſt for the ſaid *John Roper* and his heirs.

Deviſe of lands to a papiſt is a purchaſe within the meaning of the act 11. & 12. *Will.* 3. to prevent the growth of popery. S. C. poſt. 181. S. C. 10. Mod. 230. S. C. 2. Eq. Abr. 620. S.C. 1. Bro. P.C. 450. 2. Wil. Rep. 5. Stra. 267.

Afterwards the ſaid *John Roper* made his will, dated the fifth of *March* 1708, reciting the ſaid leaſe and releaſe, and the power reſerved to him therein to diſpoſe the ſurplus of the ſaid money, and deviſed ſeveral money legacies to ſeveral of his relations mentioned in the ſaid will; and the reſidue of all his real and perſonal eſtate he deviſed to the reſpondents, * *Thomas Radcliffe* and *William Conſtable*, *Robert Hewitt* and *Daniel Hickman*, their heirs and aſſigns, for ever, and made them joint executors. * [168]

In the year next following, *viz.* the firſt of *April* 1709, the ſaid *John Roper* added A CODICIL to his will, and thereby deviſed ſeveral legacies to perſons therein mentioned, and all the remainder,

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der, whether in lands or in perſonal eſtate, he deviſed to his ſaid executors, *Radcliffe* and *Conſtable*, the now reſpondents. And in the ſame month, *viz.* the tenth of *April* 1709, the ſaid *John Roper* added another codicil to his will, and thereby deviſed to the ſaid *Thomas Radcliffe* all his houſehold goods, and power to renew the leaſe of his dwelling-houſe if he thought fit; and he deviſed all his books to the ſaid *William Conſtable*, and ſoon after he died.

Then *Thomas Radcliffe* and *William Conſtable* exhibited their bill in chancery againſt *Edward Roper*, and againſt *Snow* and *Hickman*, and others, to have the truſt-eſtate ſold, and to have an account of the profits, and (after the debts and legacies were paid) to have the ſurplus money ariſing by ſuch ſale, equally to be divided between them to whom it was deviſed by the firſt codicil.

To which bill *Edward Roper*, the defendant (the now appellant), put in his anſwer, inſiſting, that he was heir at law to the ſaid teſtator *John Roper*, and entitled to all ſuch real and perſonal eſtate not ſufficiently deviſed or conveyed by him; and that the reſpondents, *Radcliffe* and *Conſtable*, are, and at the time of the teſtator's death were, PAPISTS, and perſons profeſſing the popiſh religion, and as ſuch were rendered incapable by the ſtatute 11. & 12. *Will.* 3. c. 4. of purchaſing any lands or profits out of lands; and that the appellant is heir at law, and A PROTESTANT, and therefore claimed the benefit of that act, being capable by law ſo to do; and demanded the judgment of the Court, whether he ſhould be decreed to join in the ſaid ſale.

And the other defendants *Hewitt* and *Hickman*, by their anſwer, inſiſted, that the real eſtate deviſed by the will ought to be conſidered as the remaining part of the teſtator's lands, after ſo much thereof was ſold as would be ſufficient to diſcharge all his debts and legacies; and if the other reſpondents *Radcliffe* and *Conſtable* were incapable to take them, being diſabled by the ſtatute, becauſe they were papiſts, then the ſaid defendants *Hewitt* and *Hickman*, being the two proteſtant executors, claimed the ſame, as being the
* [169] * only deviſees capable to take by virtue of the will; and they inſiſted, that the firſt codicil, as it related to a deviſe of the teſtator's lands, did not controul the deviſe of the reſidue of the teſtator's lands to *Radcliffe* and *Conſtable* mentioned in the will; becauſe, if they were incapable by the ſtatute to take the lands by the will as purchaſers, they are to be eſteemed as perſons not in being, and that in ſuch caſe that codicil was void in law.

But admitting they were capable of taking the remainder by the firſt codicil, yet that gave them no greater an eſtate than for life; and if ſo, then the reverſion in fee muſt come to the defendants *Hewitt* and *Hickman*; and for that purpoſe they brought their croſs-bill, inſiſting upon this matter, as they had done by their ſaid anſwer to the original bill; and the ſeveral defendants, and the mortgagees, and the creditors, having put in their ſeveral anſwers,

and

and the legatees having exhibited their bill to be paid their legacies, all the ſaid cauſes came to a hearing the twenty-ſeventh of *June* 1712, before the *Lord Keeper* HARCOURT, who took time to have the opinion of the Judges before he would make any final decree.

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And A CASE was ſtated and argued before the *Lord Chief Juſtice* PARKER, the *Lord Chief Juſtice* TREVOR, and *Judge* POWELL; and they likewiſe taking time to deliver their opinions, they, together with SIR JOHN TREVOR, *Maſter of the Rolls*, concurred in opinion, that the deviſe of the reſidue of his real and perſonal eſtate, deviſed to the ſaid *Radcliffe* and *Conſtable*, after debts and legacies paid, was a good deviſe, notwithſtanding that ſtatute by which papiſts are diſabled from purchaſing lands, tenements, or hereditaments, for the ſurplus-money is a perſonal intereſt in them; and therefore the deviſe thereof is not void, either by the words or intention of that act.

And an account was decreed of the teſtator's real and perſonal eſtate, and that the real eſtate ſhould be ſold to the beſt purchaſer, to be approved by THE MASTER, wherein the appellant, who was heir at law, ſhould join, he being firſt paid his coſts; and a receiver of the eſtate was appointed, giving ſecurity as uſual; and the money ariſing by ſale, together with the profits of the lands till ſold, ſhould, in the firſt place, be applied to ſatisfy the mortgage of four thouſand pounds, with intereſt and coſts, and then the ſchedule-debts with intereſt; and then all the other debts ſtanding out and not diſcharged by the perſonal eſtate, and then the * legacies ſhould be paid, with intereſt and coſts, and the creditors were to come in to prove their debts. * [170]

And as to *Hewitt* and *Hickman*, THE COURT was of opinion, that the firſt codicil, by which the teſtator deviſed all the remainder, whether in lands or perſonal eſtate, to the ſaid *Radcliffe* and *Conſtable*, was a revocation of the deviſe in his will of the reſidue of all his real and perſonal eſtate to *Hewitt* and *Hickman*, and ſo their bill was diſmiſſed with coſts.

From this decree an appeal was brought in THE HOUSE OF LORDS.

And the principal points inſiſted on to maintain it were: That this deviſe was no purchaſe within the ſtatute, becauſe the word "purchaſe" in that act muſt be intended where a man is active in it, and not where lands are given to him by a will. That as *Radcliffe* and *Conſtable* could take no lands by this will, becauſe theſe were conveyed to truſtees, to be ſold for the payment of debts and legacies, and the reſidue was deviſed to them, that reſidue is no more than a pecuniary legacy, which they were capable to take, notwithſtanding the ſtatute. That it is a ſtanding rule in equity, that lands deviſed for payment of debts and legacies are to be deemed as money; and that money deviſed to buy lands is deemed

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deemed as land; and ſo it is alſo of lands or money in the hands of truſtees; therefore, as the reſpondents were under no manner of conviction as papiſts, they were juſtly intitled to this reſidue.

But IT WAS ANSWERED, AND SO RESOLVED, that this ſtatute intended to abridge the power and intereſt of *papiſts*; and if a deviſe ſhould be conſtrued to be no purchaſe within that act, then papiſts would be in a capacity to take great part of the lands in *England*; therefore a deviſe to a papiſt muſt be a purchaſe, (*i. e.*) to ſuch a papiſt who was a ſtranger to the inheritance, but not where a particular eſtate or intereſt comes to the heir at law by a deviſe, for that is but a modification of that eſtate which would otherwiſe deſcend to him, ſo as he is under eighteen years of age, and conforms within ſix months after he ſhould arrive at that age. That though lands deviſed for payment of debts and legacies are to be deemed as money ſo far as there are debts and * ſpecific legacies to be paid, yet ſtill the heir at law has an intereſt in ſuch lands by a reſulting truſt, ſo far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity, and reſtrain the vendor from ſelling more of the lands than what are neceſſary to raiſe money ſufficient to diſcharge the debts and legacies, and to inforce the deviſee to convey the reſidue to him; which reſidue ſhall not be deemed as money, neither ſhall it go to the executors of the teſtator. Nay, the heir at law in ſuch caſe may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole eſtate to him; for the deviſee is only a truſtee for the teſtator to pay his debts and legacies. This is a privilege which has been always allowed in equity to a reſiduary legatee; for if he come into court, and tender what will be ſufficient to diſcharge all the debts and legacies, or pray that ſo much of the lands, and no more, may be ſold, than what will raiſe money to diſcharge them, this is always decreed in his favour. Therefore, though lands given in truſt, or deviſed for payment of debts and legacies, ſhall be deemed in equity as money in reſpect of the creditors and legatees, yet it is not ſo in reſpect to the heir at law or reſiduary legatee; for in thoſe caſes they ſhall be deemed in equity as lands; and if ſo, then the reſidue in the principal caſe being deviſed to papiſts, it ſhall be deemed as lands; and conſequently it is a purchaſe within the ſtatute before-mentioned.

* [171]

Lands given in truſt, or deviſed to pay debts and legacies, ſhall be deemed as money in reſpect to creditors, but not in reſpect to the heir at law or reſiduary legatee.

For which reaſons the decree was reverſed in the houſe of lords, 11 *July* 1713 (*a*).

(*a*) See the arguments of the Chief Juſtice in this caſe, poſt. 181. and the enſuing caſe on the appeal of Lord Derwentwater, p. 172.

Monday, 16th February,

The Fifth of George the Firſt,

BEFORE

Sir Lyttleton Powys, *Knt. Juſtice*,
Tracy, *Knt. Juſtice*,
Sir John Forteſcue, *Knt. Juſtice*,
Sir James Montague, *Knt. Baron*,
Sir Francis Page, *Knt. Baron*,

} *Delegates to determine Appeals from the Decrees of the Commiſſioners of Forfeited Eſtates.*

* The Appeal of the Lord Derwentwater.

Caſe 75.

THE late *Lord Derwentwater*, the appellant's father, being a *Roman Catholic*, and tenant in tail male of the lands in queſtion, with ſeveral remainders over, did, upon his marriage with the daughter of *Sir John Webb*, ſuffer a common recovery, &c. and declared the uſes thereof to himſelf and his heirs; and afterwards by leaſe and releaſe he ſettled the ſaid lands to the uſe of himſelf for life, then on truſtees to preſerve contingent remainders, then to his firſt and other ſon and ſons of that marriage in tail male, with ſeveral remainders over.

A papiſt being tenant in tail ſuffered a common recovery, and declared the uſes to himſelf and his heirs; this is not a (*a*) purchaſe within the ſtatute 11. & 12. *Will.* 3.; for it is no new acquiſition, but a modification of the family eſtate.

S. C. 3. Eq. Abr. 621. Stra. 267.

Afterwards the ſaid *Lord Derwentwater* was attainted of treaſon and executed. The appellant his ſon, being then an infant, put in his claim before the commiſſioners, and by the opinion of four againſt three, the claim was diſmiſſed. From this decree of diſmiſſion he now appeals.

* The ſingle queſtion was, Whether a papiſt, by ſuffering a common recovery, and having a marriage-ſettlement, ſhall be a purchaſer within the ſtatute 11. & 12. *Will.* 3.? for if he is, then this recovery and ſettlement are void.

11. & 12. *Will.* 3. c. 4.

And this depends upon the conſtruction of that ſtatute, by which it is enacted, "That after the 29th of *September* 1700, perſons

(*a*) The like determination as to the meaning of the word "purchaſe," in ſtat. 9. *Geo.* 1. c. 7. ſ. 5. concerning purchaſing an eſtate or intereſt in a pariſh, the conſideration whereof is under 30l. 3. Burn's Juſt. 362. 8vo edit. 1766.

"educated

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"educated in, or profeſſing, the popiſh religion, who ſhall not, "within ſix months after they attain the age of eighteen years, "take the oaths of allegiance and ſupremacy, and make and ſub- "ſcribe the declaration, &c. ſhall be diſabled, but not their heirs "or poſterity, to inherit or take any lands, &c. in this kingdom, "&c." And, "That after the 10th of *April* 1700, no papiſt "ſhall purchaſe, mediately or immediately, any lands, tenements, "or hereditaments, within this kingdom, or profits out of the "ſame, but all ſuch eſtates or profits out of lands ſhall be void."

For the appellant.

THE COUNSEL *for the appellant* argued, that it was never yet queſtioned, whether a tenant in tail, being a papiſt, could ſuffer a common recovery; for if he could not, then he would be barred of diſpoſing his eſtate, and from providing to pay his debts, and to make proviſion for younger children.

That the intent of this ſtatute was, to hinder papiſts from making new acquiſitions, and to prevent the growth of their landed intereſt, but not to take from them the power of diſpoſing their eſtates; it was to make new purchaſes void, but not the alterations or modifications of their own eſtates.

The word "recovery" is not mentioned in this ſtatute, and there is no word under which it may be comprehended, unleſs it is the word "purchaſe;" but it would be a ſtrained conſtruction to make the appellant's father a purchaſer within this ſtatute, by ſuffering this recovery, and declaring the uſes thereof, becauſe a purchaſer always comes to the eſtate by the act of the party; but here the tenant in tail came to his eſtate by act of law; and therefore a papiſt will be tenant by the curteſy, and tenant in dower, notwithſtanding this ſtatute, becauſe in both theſe caſes, the eſtate is got by act of law, and not as a purchaſer by the act of the party.

Beſides, a purchaſer muſt buy the eſtate of ſomebody, which in this caſe cannot be either of the reverſioner, or thoſe in remainder, becauſe they are ſtrangers to the recovery, and never executed any conveyance.

* [174] * Neither can this tenant in tail be a purchaſer in reſpect to the tenant of the *præcipe*, or to the recoveror, becauſe they are only made parties by the direction of the law, and through neceſſity, and have nothing in reality, but a ſeiſin in fee for an inſtant.

So that if this recovery ſhould be conſtrued as a purchaſe, there will be a grantee or donee without a grantor or donor, and the tenant in tail muſt be a purchaſer of himſelf.

When tenant in tail ſuffers a recovery, he makes uſe of that privilege which he has by law of having a power over thoſe in remainder or reverſion, which power he executes by ſuffering the recovery; for it cannot otherwiſe be done; but it is inconſiſtent to ſay, that by this means he purchaſes the remainder or reverſion, when it is only a bar to them to claim the eſtate; therefore, if it be a bar, it cannot be called a purchaſe.

Beſides,

Beſides, in ſuffering a recovery, nobody is conſidered but the tenant in tail; for if he declare the uſes thereof, and if the recoveror ſhould declare other uſes, thoſe declared by the tenant in tail are good, and the other void. So if tenant in tail be diſſeiſed, and the diſſeiſor and diſſeiſee join in a fine, and they and the cognizee declare ſeparate uſes, thoſe which were declared by the diſſeiſee, and thoſe alone, are good; from which it may be inferred, that the tenant in tail is the only party intereſted in the recovery or fine, and that the recoveror or cognizee are only made parties through neceſſity, to keep up the forms of recoveries, which are of ſo great value in the law, that the *Chief Juſtice* DYER tells us, that he was not worthy to wear a gown who ſhould ſpeak againſt them.

My *Lord Coke*, in his *Firſt Inſtitute*, calls a recovery a common conveyance, and it is a privilege ſo inſeparably incident and annexed to an eſtate-tail, that the tenant in tail cannot by any means be deprived of it; therefore if a gift in tail be made on condition that the donee ſhall not ſuffer a recovery, this condition is repugnant and void, becauſe the law gives him a power ſo to do. 1. Inſt. fo. 10. a. 1. Inſt. 224. a. 6. Rep. 41. b.

In the principal caſe, if the appellant's father had declared the uſes to himſelf and his heirs, this would not have been a new uſe but the old one; ſo that if he had been ſeiſed *à parte maternâ*, and after the recovery had declared the uſes to himſelf and his heirs, in ſuch caſe the heirs (*a*) *à parte maternâ* ſhould inherit, and thoſe *à parte paternâ* would not; and if he had declared no uſes, then by operation of * law the uſe would reſult to the heirs *à parte maternâ*, and they would have immediately been ſeiſed in fee. * [175]

It hath been pretended, that every alteration of the eſtate ſhall be taken to be a purchaſe within this ſtatute, but it is quite otherwiſe; for if a papiſt is ſeiſed of a defeaſible eſtate, and levies a fine thereof with proclamations, and five years paſs without any claim, now by this means the eſtate is become indefeaſible; this is certainly an alteration of the eſtate, but nobody will ſay it is a purchaſe.

So where the father, being a papiſt, ſettles his lands upon his ſon, with a power of revocation, and after he executes that power, ſo that the eſtate is reveſted in the father, this is likewiſe an alteration of the eſtate; but it was never yet called a purchaſe.

Before the ſtatute (*b*) *De Donis*, &c. where lands were given to a man, and to the heirs of his body, &c. upon condition, that if he die without iſſue, the ſame ſhould revert to the donor; yet after iſſue born he had power to alien, and to bar ſuch iſſue, and all poſſibility of reverting to the donor, which he could not do before he had iſſue; ſo that the getting a child made a great alteration in his eſtate; but no man can ſay that he became a purchaſer by getting a child.

(*a*) Salk. 590. 3. Lev. 406. (*b*) Weſtm. 2. cap. 1. anno 13. *Edw.* 1.

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It was not inſiſted on by the Counſel on the other ſide, that the *Lord Derwentwater* could not make any ſettlement; for certainly if he had been tenant in fee-ſimple, this ſettlement had been good; but his gaining a fee-ſimple by ſuffering a recovery as tenant in tail, and declaring the uſes thereof, makes no alteration as to that matter, becauſe a common recovery is a conveyance which a tenant in tail is entitled to make by law, and thereby to do as much as any tenant in fee can do; and the power of ſuffering ſuch a recovery is inſeparably incident to every tenant in tail, and ſo cloſely united to the eſtate, that as a tenant in fee cannot be reſtrained by any condition to alien, ſo neither can tenant in tail from ſuffering a common recovery.

But the reaſon of the commiſſioners decree is, for that the *Lord Derwentwater*, by ſuffering this recovery, &c. did acquire a new and greater eſtate than he had before; ſo that by this means he became a purchaſer of ſuch eſtate.

It is true, his eſtate is new modelled, but not new made; and take it altogether, he hath a leſs eſtate after ſuffering the recovery than he had before; for if the recovery, and the declaration of the uſes and the ſettlement be looked upon * as one conveyance (for ſo it is in law), then inſtead of an eſtate-tail he hath only an eſtate for life; and there is an expreſs authority, that the recovery and the deed to lead the uſes and the ſettlement, are but one conveyance; for ſo it was reſolved in the *Lord Cromwell's Caſe* (*a*), where the bargain, the recovery, and the fine, though made at ſeveral times, yet all being made by the mutual agreement of the parties, were but one aſſurance, and tended to perfect the bargain.

* [176]

Where tenant in tail levies a fine, or ſuffers a recovery, and declares no uſes, in ſuch caſe the uſe is to him and his heirs (*b*), for it can never reſult to him in tail, becauſe that eſtate is extinguiſhed by the fine, and barred by the recovery; and therefore this lord having by an expreſs deed declared what is implied by law, this expreſs declaration and deed muſt be brought under that maxim, *viz. Expreſſio eorum quæ tacitè inſunt nihil operatur.*

It hath been ſaid, that if the *Lord Derwentwater* had been tenant in fee, this ſettlement had been good: now if that be admitted, then tenant in tail in ſome ſenſe hath as large an eſtate; for as tenant in fee may by feoffment, bargain and ſale enrolled, leaſe and releaſe, &c. diſpoſe the fee; ſo may tenant in tail, by uſing the proper means he hath by the law, which is by ſuffering a recovery; ſo that though he is not tenant in fee *in actu*, he is ſo *in potentiâ*; and it plainly appears in the Books, that he hath the whole power over the eſtate in his hands; for the remainder-man cannot charge it but at the will of the tenant in tail; for if he ſuffers a common recovery, all ſuch charges are barred as well as all the remainders, and ſhall never take place, though the tenant in tail ſhould die

(*a*) 2. Rep. 70.

(*b*) See Machil v. Clerk, 7. Mod. 18.

without

without iſſue; and that is the true reaſon why a remainder after an eſtate-tail is of no conſideration in the eye of the law, for it ſhall not be deemed aſſets in the hands of the heir; and if an action ſhould be brought againſt him, in ſuch caſe, *riens per deſcent* is a good plea for him *(a)*.

For theſe reaſons it was prayed, that the decree of the commiſſioners might be reverſed.

THE COUNSEL *on the other ſide*, who argued againſt the appellant, admitted ſeveral things which were alledged on his behalf; as that tenant in tail hath power of ſuffering a recovery, and by that means to bar the iſſue in tail, and likewiſe all remainders and reverſions; and that ſuch power is inſeparably annexed to his eſtate, and cannot be reſtrained * by any condition; and that where he ſuffers a recovery and declares no uſes, there the uſe reſults to him and his heirs; but notwithſtanding all this matter, the *Lord Derwentwater* was a purchaſer both within the meaning and letter of this ſtatute.

E contra againſt the appellant.

* [177]

It cannot be denied but that the word "purchaſe" is mentioned in this act, *viz.* "no papiſt ſhall purchaſe any lands, &c." Then it muſt be conſidered, whether this caſe comes within the legal ſignification of that word: and as to that matter, my *Lord Coke (b)* tells us, that every man who has an eſtate has it either by right or by wrong; if by right, then it muſt either be by purchaſe or by deſcent; ſo that there are but two ways to have a rightful eſtate, of which purchaſe is one; therefore this lord, after he had ſuffered the recovery and declared the uſes, &c. not coming in by deſcent, it muſt neceſſarily follow that he came in by purchaſe.

In the ſame Book *(c)* it is ſaid, that he is a purchaſer who comes to lands either by conveyance or title: now this lord came to the lands in queſtion by conveyance, therefore he is a purchaſer.

The word "purchaſe" hath been taken in this ſenſe in other acts of parliament, and particularly in the *ſtatute of Mortmain (d)*, by which it is enacted, that "lands purchaſed by people of religion ſhall "be forfeited, and that hereafter no purchaſe ſhall be made to the "uſe of ſpiritual perſons;" yet if a conveyance of lands is made to them by way of gift, or by will, they were accounted purchaſers of ſuch lands.

Words in acts of parliament are always to be underſtood in that ſenſe the law puts on them: now the deſign of this law was to put ſuch hardſhips on papiſts, that they might be obliged to part with their landed intereſt, and transfer the ſame to proteſtants.

A mortgage made to a papiſt is void; ſo that the incapacity of taking lands in any caſe is meant by this ſtatute; therefore this lord could not alter his eſtate-tail, and turn it into fee-ſimple.

(a) See Stapleton *v.* Stapleton, 1. Atk. 9. Goodright *v.* Mead, 3. Burr. 1703. Tregonwell *v.* Strachan, 1. Will. 66. 2. Stra. 1179. 5. Term Rep. 107. *notis.*

(b) Co. Lit. 2.
(c) Co. Lit. 3.
(d) 15. *Rich.* 2. cap. 5.

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The words in this act are very expreſs, *viz.* "that no papiſt "ſhall purchaſe;" it does not ſay for a valuable conſideration, but generally without any manner of reſtriction; but in ſeveral ſtatutes a diſtinction is made between a purchaſer generally and a purchaſer for a valuable conſideration; and if the parliament had intended the latter, it is probable it would have been expreſſed in this ſtatute.

[178] * Now in conſtruction of acts of parliament it has been an old rule, that every miſchief not expreſsly provided againſt is intended to be remedied by the act; and in the caſe of *Roper v. Radcliffe* (*a*), where the decree in chancery was reverſed in the houſe of peers, it was held, that a deviſe was a purchaſe within the meaning of this ſtatute; and if a deviſe be a purchaſe, certainly a recovery and a declaration of the uſes to himſelf and his heirs muſt be a purchaſe, eſpecially when by the ſtatute he is capable of taking any uſe; and he cannot take any reſulting uſe by implication of law, for that would be contrary to the maxim, *Expreſſio facit ceſſare tacitum*, and he had plainly expreſſed the uſes by the deed.

Now if this lord ſhould take by virtue of this recovery and declaration of uſes either expreſſed or implied, he would have quite another eſtate than what he had before; and the females would inherit, which they could not before; for after making this ſettlement, if this lord had iſſue a ſon, who had iſſue a daughter, ſhe would now inherit, which ſhe could not do before, becauſe he was tenant in tail male.

As to the objection which hath been made, that if this recovery ſhould be adjudged void by virtue of this ſtatute it would incapacitate papiſts from ſelling their eſtates to proteſtants, the anſwer is, that there is no clauſe in the ſtatute which puts them under ſuch an incapacity, the parliament intending it for the benefit of proteſtants; and therefore it ought to be taken in the largeſt ſenſe, and to extend to every conveyance by which a papiſt ſhall take lands as well as to a purchaſe for a valuable conſideration.

Objection. It has likewiſe been objected, that the power of ſuffering a common recovery being a privilege inherent to an eſtate-tail, it could never be the intent of the parliament to reſtrain that privilege, eſpecially ſince the word *recovery* is not mentioned in the ſtatute.

Anſwer. It is very true, the word itſelf is not mentioned; but as a recovery is a purchaſe, it may properly be ſaid to be within the words of the ſtatute, and conſequently within the intent thereof; and to prove that a recovery is a purchaſe, it was inſiſted, that as ſoon as it is ſuffered, there is an eſtate in fee in the recoveror, and all the uſes ariſe out of his eſtate, and a purchaſer, even for a valuable conſideration, muſt claim the eſtate of the recoveror, and not of the tenant in tail who ſuffered the recovery.

(*a*) Antea hic.

Now

* Now the intent of this act was to hinder papiſts from taking greater and better eſtates than they had before, *viz.* from taking a fee-ſimple where before they had only an eſtate-tail, and to reſtrain them from making ſettlements to perpetuate their eſtates in their families.

Where a papiſt is tenant in tail, remainder over to another, and he in remainder conveys his eſtate to the tenant in tail, this would be a purchaſe, and void within this act.

Now in the principal caſe, the *Lord Derwentwater* got the remainder by ſuffering this recovery; but the caſe is the ſame, whether he got it by conveyance or recovery; for both are void by this ſtatute, which, if it ſhould be otherwiſe conſtrued, it would be in the power of a papiſt tenant in tail to bar the remainder in fee in a proteſtant: and though it may be ſaid, that it ſhall bar the iſſue in tail, and the remainders, ſo that they ſhall never take any advantage againſt it; yet the crown being a ſtranger to the recovery may ſet it aſide, becauſe, in reſpect of the crown, the eſtate-tail is *in eſſe*; ſo is the caſe of *Crocker v. Kelſea* (*a*), where tenant in tail levied a fine, and declared the uſes to himſelf and his heirs, it was reſolved, that the eſtate-tail was barred as to him who levied the fine, and as to his iſſue; but that *in rei veritate* it was not determined, for all ſtrangers might ſay that it was in being.

It is true, when tenant in tail ſuffers a recovery, every one who comes in by ſuch recovery, comes in continuance (*b*) of the eſtate-tail, and muſt be liable to all the charges made by the tenant in tail, and the charges of thoſe in remainder are barred; but this doth not prove, that an eſtate-tail is as large as an eſtate in fee, which is the point now in queſtion; therefore if this lord has gained a new and greater eſtate than he had before, it is plain ſuch eſtate is void, within the intent and words of this ſtatute.

The queſtion is not, Whether a recovery ſuffered by tenant in tail ſhall bar the remainders and contingencies expectant upon ſuch eſtate? but, Whether he who ſuffered the recovery ſhall (after the making this ſtatute) take any advantage of it after it is ſuffered?

As to the caſe put on the other ſide, *viz.* that where tenant in tail *à parte maternâ* ſuffers a recovery, and declares no uſes, in ſuch caſe the uſe ſhall be to the heirs *à parte maternâ*, this is not law; it is true, it is ſo where a man is tenant in fee-ſimple, but not where he is tenant in tail.

* Upon the whole matter it was inſiſted, that the *Lord Derwentwater* was a purchaſer within the words and intent of the ſtatute; therefore it was prayed, that the appeal might be diſmiſſed. * [180]

But the decree of the commiſſioners was reverſed by THE DELEGATES, by the opinion of four againſt *Juſtice* FORTESCUE.

(*a*) Cro. Jac. 688. Hutt. 84.
(*b*) Benſon *v.* Hodſon, T. Raym. 236. 1. Mod. 108. 2. Lev. 28.

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BY THE COURT. It is plain, that a papiſt under the age of eighteen years at the time of making this ſtatute may take either by deſcent or purchaſe, and that the word "purchaſe" in this ſtatute is only a modification of the eſtate, and ſhall not be taken in the full extent of the word; for thoſe purchaſes are only intended by the ſtatute by which papiſts enlarge and extend their landed intereſt, and not where by deeds of ſettlement the ancient family-eſtate is new modelled, without making any new acquiſition; ſo that even at this day a purchaſe by limitation in a ſettlement, or by a deviſe to a papiſt under the age of eighteen years, is good, ſo as ſuch papiſt, within ſix months after he comes to that age, conform and take the oaths, &c. otherwiſe he loſes the pernancy of the profits during his life only.

The

The Twenty-Eighth of October 1712,

IN

The Court of Chancery.

Sir Simon Harcourt, *Knt. Lord Chancellor.*
Thomas *Lord* Parker, *Chief Juſtice B. R.*
Sir Thomas Trevor, *Knt. Chief Juſtice C. B.*
Sir John Powell, *Knt. Juſtice B. R.*

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* *The Arguments of the then Chief Juſtice of B. R.* * [181]

Roper *againſt* Radcliffe. Caſe 76.

THE firſt and great queſtion in this caſe is, Whether the intereſt deviſed by *Mr. Roper* be ſuch an intereſt, or of that ſort as is within the words (or intent) of the ſtatute 11. & 12. *Will.* 3. c. 4.? And herein it will be proper to conſider, FIRST, The words of the act. SECONDLY, The nature of the intereſt. S. C. ante, 167. S. C. 1. Bro. P. C. 450.

FIRST, There are two expreſſions (or clauſes) in the act that concern this point. By the firſt, "every papiſt, or perſon profeſſing the popiſh religion, is diſabled and made incapable to "purchaſe any manors, lands, tenements, rents, or hereditaments "in his own name, or in the name of others to his uſe, or in "truſt for him." By the ſecond, "all eſtates, terms, and any "other intereſts or profits whatſoever, out of lands, tenements, or "hereditaments, made after the tenth of *April* 1700, to, or in truſt "for, the benefit of a papiſt, &c. are made void." So that all "lands, tenements, rents, and hereditaments," are within the firſt; and "all eſtates and terms, inheritable or not," and "all other in-"tereſts or profits whatſoever, out of lands, &c." are expreſſively within the ſecond. There are no qualifying words to make it material, whether the term or intereſt be long or ſhort, or what other circumſtances it be attended with, provided it be "out of land, "&c." And the word "whatſoever" ſeems to be added on purpoſe to ſhut out all pretence of diſtinction between one "eſtate, "term, intereſt," or "profit out of land," and another. Now,

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to the intereſt deviſed to *Mr. Conſtable* and *Mr. Radcliffe*, it is a truſt and an intereſt, and as ſuch it is demanded by their bill. * And of what nature it is, will appear by the deed, the will, and
* [182] the codicil, whereby it is created and diſpoſed. The creation of
Ante, 167. it was thus: *Mr. Roper* by leaſe and releaſe conveys ſeveral lands and manors in the counties of *Cornwall*, *Glouceſter*, and *Monmouth*, particularly named; and all other his lands, tenements, and hereditaments in thoſe counties, to *William Conſtable*, *Eſq.* *R. Hewit*, and *Daniel Hickman*, and their heirs, upon truſt, as ſoon as conveniently may be, to make ſale of the premiſes in parcels, or in the whole, to the beſt purchaſer or purchaſers, and for the beſt price or prices that can be reaſonably had or gotten for the ſame; and by and out of the rents and profits ariſing (thereout) till ſuch ſale; in the firſt place, to pay four thouſand pounds owing to *Sir Robert Cotton* and *John Proby*, ſecured upon the lands in *Cornwall*, with the intereſt thereof; and then to pay the debts in the ſchedule, being three debts, amounting to three hundred and ninety pounds. And then "to pay and diſpoſe the reſidue to and "for the benefit of ſuch perſon and perſons, and to and for ſuch "ends and purpoſes, and in ſuch manner as the ſaid *J. Roper*, by "any writing or writings under his hand and ſeal, teſtified by three "or more credible witneſſes, or by his laſt will and teſtament in "writing ſo teſtified, ſhall direct, limit and appoint; and in de"fault of ſuch appointment, or until ſuch direction, limitation or "appointment ſhall be made, to pay and diſpoſe of ſuch reſidue "or overplus to and for the benefit of the ſaid *J. Roper* and his "heirs." And the truſtees are declared chargeable only for ſo much as they reſpectively ſhall actually receive. The truſt being thus created, *J. Roper* makes his will, and reciting the ſaid deed in purſuance of the ſaid indenture, or by any other power veſted in him, he gives, deviſes, and bequeaths out of the ſurplus of the money ariſing, or to ariſe by and out of the ſale or ſales of thoſe manors, lands, and premiſes, and by and out of the rents and profits of the premiſes ariſing till ſuch ſale, the ſeveral ſums following; and ſo diſpoſes of ſeveral ſums, in all about ſixteen hundred pounds, and then goes on: "And as to all the reſt and reſidue of my eſtate "both real and perſonal, of what nature or kind ſoever, I give,
* [183] "deviſe, and bequeath the ſame to the ſaid *William Conſtable*, and "unto the honourable * *T. Radcliffe*, *Eſq.* *Robert Hewit*, *Gent.* "and the ſaid *Daniel Hickman* equally, and unto their heirs and "aſſigns for ever." And makes them executors. And afterwards adds a codicil, and diſpoſes of one hundred and forty pounds in legacies (though out of the lands), and then goes on thus, "All my remainder, whether in lands or in perſonal eſtate, I leave "to my worthy and beloved executors *T. Radcliffe* and *William* "*Conſtable*." The particular times of executing theſe ſeveral inſtruments appear not; but their dates are near together, *viz.* the leaſe and releaſe, 17 and 18 *January* 1708; the will, 5 *March* 1708; the codicil, 2 *April* 1709. So that the truſt now contended for, is that truſt which *Mr. Roper* reſerved to himſelf and his

his heirs, in the ſurplus of the money to be raiſed by the ſale of his lands, rents, and profits, and till ſale, after the payment of the ſeveral debts and legacies appointed. And it is deviſed by the will to his four executors, and their heirs, under the title of "the reſt and "reſidue of his eſtate real and perſonal." And by the codicil to two of thoſe executors, under theſe words, "all my remainder, "whether in lands or perſonal eſtate." And there appears no other eſtate to anſwer the words "real eſtate" in the will, or other lands (or perſonal eſtate) to anſwer thoſe in the codicil, but this truſt. The lands are not turned into money in his life-time, but remain yet unſold in the hands of the truſtees, ſubject to, and charged with this truſt.

And, SECONDLY, THE QUESTION now is, Whether this truſt, this right to the ſurplus, to be received out of thoſe unſold lands, be within this act of parliament? *i. e.* Whether it be an hereditament or an eſtate, or any intereſt or profit whatſoever out of lands? (for if it be any of theſe, it ſeems clearly within the act.)

This may be conſidered in two different views:

Firſt, As it agrees with thoſe other ſums appointed to be raiſed by this truſt, in this reſpect, that it is a right to ſomething to be raiſed out of lands.

Secondly, As it is diſtinguiſhable from thoſe other ſums, in reſpect of its being a ſurplus after the other charges are paid off.

* Firſt, Had this not been a ſurplus, but a certain ſum appointed to be paid out of thoſe lands, it muſt be admitted to have been within the act; for that ſays, "any intereſt or profit out of "lands for the benefit of perſons profeſſing the popiſh religion." Now, that it is for the benefit of perſons profeſſing the popiſh religion, is agreed. And, that it is "an intereſt in (or out of) lands," ſeems moſt clear. *[184]

For, *firſt*, The truſtees hold the legal eſtate in the lands, not at all for their own advantage, but (in the words of the act and of the truſt) for the benefit of others.

Secondly, Suppoſe the executors and legatees, and thoſe who are entitled to the ſurplus, releaſe to the truſtees all their right in the land, it will extinguiſh this right. And in ſuch caſe the truſtees, who had before only a nominal eſtate, will then have the beneficial eſtate too; *i. e.* the whole fee, both legal and equitable.

Thirdly, If they grant all their right, title and intereſt in thoſe lands, this (intereſt) will paſs.

Fourthly, If they ſhould grant the land itſelf, it can be no queſtion but this will paſs.

Alſo

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Also we may consider the nature of this interest further, as it is a right to a sum to be raised out of land.

First, The estate and concern of the trustees therein, *viz.*

They have an estate in fee, in trust, to apply the profits, or permit them to be applied for the benefit of the persons to whom the several sums to be raised are appointed to be paid.

First, If there were not an express appointment for them to sell, but that the monies were to be raised out of the profits; they could not sell without consent of him that has the surplus, but must be contented to take the profits as they arise.

Secondly, Though there be an express trust and power to sell, yet it only authorizes them to sell. If, and when they can. And on the best prices, &c. And in the mean time all the profits are in their hands by anticipation; and the trust (or right) is to be managed in the same manner as if to be raised out of the rents and profits only.

* [185] * *Thirdly*, Consider the interest and power of the trustees, *viz.*

They amongst them have the whole trust of the lands, which is a power over the estate therein. And those who are entitled to have particular sums raised, have particular trusts carved out of the inheritance in nature of chattel interests. For,

He that has five hundred pounds appointed to be raised out of an estate of one hundred pounds a-year, has an interest (in the land) of like nature, and much of the same continuance, as if he had a trust (therein) for five years.

If the trustees make not the most of the lands, or suffer not him to do it, they break their trust: A trust to sell being, as I observed before, but in nature of a power to sell. And,

First, Till sale, his right to the profits is the same as if no such power.

Secondly, By sale, his interest in the land is gone, and he now has a trust in the money, and is paid so much the sooner.

Secondly, This trust now in question may be considered as it is distinguishable from the particular sums to be paid out of those profits, in respect of its being a right to a surplus after debts and legacies paid.

And in that respect I think it yet more clearly within the act.

First, *Upon the construction of the deed.* For thereby it was so vested in *J. Roper*, as to be not only an interest and profit out of lands, but such a one as was an hereditament, and descendible to his heirs, it being expressly reserved to *J. Roper* and his heirs. And it is agreed on all hands, that *Ed. Roper*, the heir, would

would be entitled to it, if the will and codicil were out of the way. And,

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If it were merely perſonal, a limitation to him and his heirs would veſt it wholly in him, and it would go to his executors.

Secondly, The conſtant opinion in chancery. All the caſes there, both for and againſt heirs, who have ſued for ſuch ſurplus, are authorities, that the truſt of ſuch a ſurplus is a real eſtate, and deſcendible to the heir of him who created it.

But before I ſtate the caſes, I would mention that, which is the ground both of theſe caſes of truſts, and alſo of the caſes of uſes executed by the ſtatute.

* AND, firſt, of uſes. *[186]

A uſe, before the ſtatute of Uſes, was a mere truſt cognizable only in equity, and is ſince expounded in the common-law courts by the rules of equity; and as to that, I would uſe the words of *Lord Coke (a)*, "Whoſoever is ſeiſed of lands, has not only the "eſtate of the land in him, but a right to take the profits, which "is in nature of a uſe." So that if the lands deſcended of the part of the mother, the uſe ſhall go to the heir of the part of the mother (*b*), which could not be if it were not the old uſe (or eſtate) but only a thing newly created. And the like law is of the cuſtom of borough *Engliſh*, gavelkind, &c. This is called a *reſulting uſe*. And the law is the ſame, if after particular uſes there were an expreſs limitation to the feoffor and his heirs (*c*). Indeed ſome Books do mention this laſt as a new uſe; but it has been divers times reſolved and ſettled to be the old uſe, as in the caſe of *Godbolt v. Freeſton* (*d*), and the caſe of *Abbot v. Barton* (*e*). See Salk. 679.

Secondly, As to truſts.

A man in conſideration of equity has an eſtate in land as a truſt; this is as a uſe in conſideration of law, and follows the perſon of *ceſtui que truſt*, being a beneficial intereſt and profit. And ſo much of the truſt as in a conveyance is undiſpoſed of, the executor (Q.) has in him as his antient truſt. This is called a *reſulting truſt*. And if the diſpoſition be by will, the like reſulting truſt will deſcend to the heir as part of the antient truſt not deviſed from him. So a conveyance or deviſe to truſtees to pay debts, paſſes the whole eſtate in law, and part only of the truſt; that is, truſts for the particular ſums in nature of chattel intereſts, after which the reſidue of the truſt reſults to him or his heir as undiſpoſed; and ſuch reſidue is the fee of the antient truſt deſcendible; as in the caſe of *Culpeper v. Auſtin (f)*. And in *Trinity Term*,

(*a*) Co. Lit. 23. a.
(*b*) Hurſt v. Winchelſea, 2. Butr. 880. Pearſon v. Shore, 1. Atk. 480.
(*c*) Co. Lit. 22. b.
(*d*) 3. Lev. 406.
(*e*) In the common pleas, Trinity Term 7. *Ann.* Salk. 590. 11. Mod. 181. Comy. Rep. 160.
(*f*) Michaelmas Term 28. *Car.* 2. 2. Chan. Caſes, 115. 121. 223. S. C. 1. Eq. Abr. 272.

in

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in the thirty-fourth year of *Charles the Second*, it was laid down as a rule, that when lands are appointed to be ſold, or are conveyed in truſt to pay * debts, the heir is entitled to have the lands
* [187] after the debts paid, by an implied and reſulting truſt. In *Ventris (a)* it is ſaid, "if lands be deviſed for the payment of "debts and legacies, and the reſidue of the perſonal eſtate be given "to the executor (after debts and legacies paid), the perſonal "eſtate ſhall notwithſtanding, ſo far as it will go, be applied to the "payment of the debts and legacies, and the land no further charged "than is neceſſary to make up the reſidue." In the caſe of *Collet v. Collet (b)*, if a man makes a leaſe, or deviſes an eſtate for years (he being ſeiſed of an eſtate of inheritance) for payment of debts, if the profits of the land ſurmount the debts, all that remains ſhall go to the heir, though not ſo expreſſed; and albeit it be in the caſe of an executor. Alſo the caſe of *Cook v. Gwavas (c)* was thus: *J. Cook*, 28 *Julii* 1671, after ſeveral particular legacies, deviſed all his goods and chattels to *R. Cook*, *Eſq. Eliz. Cobb*, and *William Gwavas*, to their own diſpoſition, and makes them executors: and by indenture of the ſame date demiſed ſeveral manors and lands in *Norfolk* to the ſaid *Cook* and *Gwavas* for five hundred years, upon truſt for himſelf for life, and after his death upon truſt out of the rents and profits to pay his debts, legacies, and funeral expences; and four years after to attend the inheritance. The plaintiff, as grandſon and heir to *J. Cook*, exhibited his bill to have an account of the perſonal eſtate, and of the rents and profits of the real eſtate, and that the perſonal eſtate might be applied to pay debts and legacies, in eaſe of the real. The defendants, the executors, inſiſted, that they were entitled to the perſonal eſtate, as a legacy, and the two truſtees claimed the profits of the lands for four years, after the debts and legacies paid, as an implied gift, the term being appointed to attend the inheritance after four years. But it was decreed, that the perſonal eſtate be applied in exoneration of the real eſtate; and that the four years be in truſt for the complainant, and ſuch other perſons as ſhall have the freehold and inheritance; and to attend the ſaid freehold and inheritance. In the caſe of *Sir John Packington (d)*, *Sir Herbert Perrot*, by will
* [188] dated 21 *June* 1682, made his wife (who afterwards married * *Sir Cyrill Wyche*) executrix, charging her to ſee his will performed, and thereby gives her a rent-charge of two hundred and five pounds, with this ſpecial truſt, that ſhe may be ſupplied with money for the payment of all his debts and legacies; "to which end, I do here-"by give to my ſaid executrix a leaſe for thirteen years, to begin "within ſix months after my deceaſe, of all the ſaid rent-charge "of two hundred and fifty pounds a-year." And this was decreed

(a) Eaſter Term 32 *Car.* 2. Anonymous, 2. Vent. 349.

(b) Trinity Term 34. *Car.* 2. 2. Vent. 355.

(c) In the exchequer, 25 *January* in 33. *Car.* 2. 2. Vern. 645.

(d) Wyche v. Packington and his Wife, in the exchequer, 22 *June* 1708, and 30 *May* 1709. 2. Eq. Abr. 507. 744. 1. Brown P. C. 372.

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to be a truſt for the heir after debts and legacies paid; and this decree was affirmed in parliament on the fifteenth of *May* 1712 (*a*). Theſe caſes were indeed upon *terms for years*, but the ground of them was this, that though all the term was parted with, yet only part of the truſt thereof was diſpoſed; and that not only the inheritance, but likewiſe all the truſt undiſpoſed (*i. e.* the whole truſt of the inheritance, and the reſidue of the truſt of the term) deſcended to, and was part of the old truſt in the heir. And the reaſon is the ſame where it is of *an inheritance*; if only part of the truſt be diſpoſed of for payment of debts or legacies, &c. the reſidue of the truſt remains ſtill undiſpoſed. There have been divers caſes of that kind, viz. *North v. Crompton (b)*: *Catherine Crompton* ſeiſed in fee of the lands in queſtion, by her will, dated the twenty-firſt of *January* 1669, deviſed to *H. North, Eſq.* her executor, all her eſtate real and perſonal, to diſpoſe of for payment of all her debts and legacies; and *int. al.* gives two hundred pounds to the defendant, her uncle, and heir at law. And upon the hearing two queſtions were made: Firſt, Whether this was a deviſe in fee; and, ſecondly, Whether *Mr. North* (the defendant claiming by an implied truſt after debts, &c. paid) might not aver againſt that implication? And after long debate it was decreed againſt the heir at law, *viz.* Firſt, That a fee did paſs by the deviſe; and, ſecondly, That there was not any implied truſt of the ſurplus for the heir, becauſe there was two hundred pounds given to him, which was to no purpoſe if the ſurplus had been intended him: which caſe plainly admits a reſulting truſt in the heir, unleſs the intent of the teſtatrix appeared to diſpoſe it from him. And in this caſe we may obſerve, that the queſtion was ſingly, whether there were any truſt at all created, or intended, as to the ſurplus; but not the leaſt doubt, that if all had not paſſed, the reſidue would have gone to the heir. * And all theſe caſes ſuppoſe this ground and rule, that if any part of the truſt were undiſpoſed, it was the old truſt, deſcendible to the heir. And the labour of all the contending parties is to ſhew, that it is, or is not, all diſpoſed. * [189]

But in the preſent caſe there is no queſtion, but that the grantees were bare truſtees of the ſurplus. A truſt is here on all hands admitted; it is indeed expreſsly declared, and our queſtion is only concerning the nature of it, *i. e.* Whether deſcendible, or not?

Now all the before-cited caſes admit it is deſcendible, if there be one; for they no where tell the heir, that the truſt, if there be any, is not deſcendible. But the ſingle anſwer they reſt on is, that there is no truſt at all.

The caſe of *Coote v. Moore*, the twenty-ſecond of *January* 1691, went yet further: *William Earl of Meath* conveyed ſeveral manors and lands in *Staffordſhire* to the *Counteſs of Drogheda*, and

(*a*) 1. Brown P. C. 372. (*b*) 1. Chan. Caſes, 196. S. C. 1. Eq Abr. 272.

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Humphries, to the uſe of himſelf for life, with power to ſell, and pay debts, in a ſchedule, and what other debts he ſhould owe at his death; and to pay the ſurplus to his daughters, who were his heirs; and afterwards deviſed his perſonal eſtate to his wife.

He ſold part of the eſtate himſelf, and contracted for ſale of other part thereof, and died; and on the ſeventeenth of *July* 1655, upon a bill of the purchaſers to have their purchaſe perfected, it was declared, that the perſonal eſtate ought to be applied in aid of the real eſtate for the benefit of the heirs. And afterwards on a bill by *Sir P. Coote*, who married the *Lady Elizabeth*, one of the daughters, and the ſaid lady his wife, and by the *Lady Catharine Brabazon*, the other daughter, on the twenty-ſeventh of *January* it was decreed, that the particular eſtate ſhould be applied to exonerate the real eſtate in favour of the heirs at law; and yet there was no real eſtate but this ſurplus, which was looked upon to be a real eſtate. And this decree was affirmed in the houſe of peers in 1692. (*Note*, the diviſion of the houſe was equal.) And I obſerve from the printed caſe which I have ſeen, that that which the appellant relied upon was,

Firſt, The conſtant intention of the earl, that the counteſs ſhould have the perſonal eſtate.

Secondly, That the truſt eſtate was expreſsly charged with debts.

But nothing was urged, that it was not an inheritance.

* [190] * And I take it to be the conſtant received opinion in this court, that this ſort of truſt is inheritable.

Firſt, Now ſuppoſe the truſt had been, to raiſe the ſeveral ſums out of the profits, and to pay the reſidue of the profits to him and his heirs; no doubt but this had been part of the antient truſt, and inheritable, and would deſcend to his heir. And the truſt to ſell, as I before obſerved, is but a power till executed; and the truſt differs nothing from that in the mean time.

Secondly, Suppoſe a man ſeiſed in fee gives power to his executors to ſell his lands, &c. and to pay the money or ſurplus to his heirs; he there has power over the legal eſtate, as here he has over the truſt; but till that power be executed, the old fee deſcends to the heir; and when it is executed, then ariſes a truſt in the money in lieu of that in the land, which is now ſold and turned into money.

As in the caſe of *Abbot v. Burton*, in the common pleas, before mentioned, *A.* conveys her lands to ſeveral particular uſes; and after the particular eſtates ended, to the uſe of her and her heirs, with power to appoint the ſame to ſuch perſons, and for ſuch eſtates as ſhe ſhould think fit, till ſuch appointment made; here the uſe to her and her heirs is, no doubt, the old uſe; and if not directed by an appointment, ſhall deſcend to her heir; and if the land came from

from the part of the mother, ſhall deſcend to the heir of the part of the mother.

Thirdly, I obſerve ſome part of the land in the deed belonged formerly to dame *Dorothy Drummond*, who was *J. Roper*'s mother's mother: and then if they deſcended to him from her, and he had made no will or codicil, but the truſt, according to the limitation in the deed, had been to the heir; I would be glad to know what heir would have had it. Would it not have been the ſame heir who would have taken the lands if they had not been charged? No doubt ſuch a reſulting uſe, a uſe limited by him, to him and his heirs, would have gone to the heir on the part of the mother. And ſurely the truſt of the ſame lands, being ſo much of the ſame truſt undiſpoſed, muſt have gone the ſame way.

Fourthly, I take it, that the truſt, if not deviſed away, would have been affets by deſcent in the hands of the heir, upon the ſtatute of Frauds and Perjuries.

Fifthly, That when it is ſo deviſed, the heir is ſo far diſinherited, and the deviſee put in his place.

Sixthly, That a deviſe of all his perſonal eſtate would not paſs it, &c.

* This is the nature of it, as it ſtood in *J. Roper* himſelf; and I take it, that upon the deviſe here it is no way altered. Here is no alteration appointed. * [191]

I think it would have made no difference, if he had given it by way of appointment. But here it is given as part of *J. Roper*'s eſtate, and conſequently not being any part of his perſonal eſtate, it muſt be real. By the will it is given by the name of the reſidue of his real eſtate, and in the codicil it is called his remainder in the land.

So that the deviſees (if the deviſe be good) have the truſt (in the lands).

Firſt, As it was in *J. Roper*: and, ſecondly, As it would have been in his heir: and therefore,

Firſt, An hereditament. *Secondly*, A deſcendible truſt in the land.

I ſhall now in the next place conſider the conſequence, if this caſe ſhould be conſtrued to be out of the act of parliament.

I think it has been rightly obſerved by the Counſel for the plaintiffs at the bar, and by all who have ſpoken to it on the bench, that the deſign of the makers of this law, was, firſt, To get the lands of this kingdom out of the hands of papiſts; and therefore it lay difficulties upon them in keeping of their lands, in order to induce them to ſell them. And, ſecondly, to prevent them from making any new acquiſition.

I agree

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I agree likewiſe, that the reaſon of the parliament in forming this deſign probably was, that they looked upon the landed intereſt to be the ſtrength of *England*; for that ſuch intereſts and eſtates in lands give great authority and influence over their particular tenants, and other dependants.

That it might influence elections to parliaments, if papiſts, &c. have power to make their tenants freeholders, or to accommodate with their lands ſuch as had no freeholds of their own, by ſome other title.

And I obſerve, that in many of the Weſtern manors (ſome of theſe perhaps are of that ſort) the tenants are frequently freeholders, or have other rights of voting (in corporations, &c.).

In ſhort, therefore, the law-makers ſeem to have eſteemed eſtates
* [192] and intereſts in lands to be weapons, which * papiſts, when they had them in their hands, made uſe of againſt the public and the government.

I obſerve, likewiſe, that they have expreſsly and particularly provided againſt terms made to papiſts; ſo that by the expreſs words of the act, a term for two years, nay, for aught I can ſee, a term for one year, or for any certain time, is prevented from being made to papiſts.

It ſeems, they thought an intereſt of ſo ſhort a continuance (though not of ſo great miſchief or danger as an inheritance) was yet of ſome miſchief, and ſo much as to deſerve a remedy.

And I obſerve, that the truſt of a term is as much within the act as a legal intereſt in the term; and that the eſtate in the hands of the truſtees of a papiſt is of the ſame conſideration, as while it is in his own hands.

Let us now conſider a truſt of this ſort as is here deviſed, and ſee what difference there will be between this and the moſt direct truſt in land, or any the moſt open and notorious term or eſtate in land. And to me it ſeems plain, that there will be the ſame influence over tenants and others, as in the caſe of a direct ownerſhip.

We are now upon the nature of a truſt in general, and not upon the particular circumſtances of this caſe; ſo that a greater or leſſer eſtate, a greater or leſſer charge, a greater or leſſer ſurplus, will make no difference in this point, whether within the act, or not.

Suppoſe an eſtate of one thouſand pounds a-year is conveyed to truſtees, on truſt to ſell and pay off three thouſand pounds, and a papiſt has a right to the ſurplus. The management of ſuch ſale falls naturally into the hands of himſelf. And the inſolvency of tenants, or ſmallneſs of the rents, is only his loſs. And the ſinking of the debts, and increaſing the ſurplus, is to his only benefit; therefore the putting in, or out of tenants, agreeing upon

upon the terms and rents, and forbearing, arreſting, or diſtraining the tenants, &c. will of courſe be according to his pleaſure. Alſo,

The truſtees are his friends, and therefore named truſtees for him: and they willingly and moſt ſafely leave it to his management; nor can they ſafely interpoſe or act otherwiſe (than he deſires) without hazard and trouble. But,

Suppoſe the management were in the truſtees, yet they are the truſtees of a papiſt, and for his benefit, which is equally within the act.

* FIRST, Well, but ſay they, the ſale will put an end to this, ſo that it can be of no long continuance. * [193]

ANSWER. Any term, as I have ſaid, is within the act, as for a ſingle year, perhaps for half-a-year, certainly for two years. And this in the nature of it muſt exceed that time. For it muſt wait ſome time, either to meet with the beſt chapmen; or to get the beſt price.

And this is to be for every parcel or part.

So that here is no certainty, nor even probability of the ending of this truſt in many years.

SECONDLY, It is ſaid, he is only a tenant at will to the truſtees, and they may ſell without him.

ANSWER. He is indeed but tenant at will to them; but they have no will but his.

Which way then can a ſale be expected without his conſent? For,

Firſt, The truſtees are his friends; and they (or he) may either diſparage the title, or object to the price, or pretend better bidders; or may ſay, it is unreaſonable; or that they will have a better price, &c.

Secondly, As to the executors and legatees, if they preſs the ſale, it is but giving them ample ſecurity; they may be made eaſy with intereſt, &c. And if there be no other way, it is but to get a friend to advance the money, and all will be eaſy.

Thirdly, But you will ſay, the chancery will ſet all right, *i. e.* order a ſale of the land, and turn it into money. But, how ſhall it come there when all the parties are made eaſy, *viz.* the executors and legatees are ſecured or ſatisfied; and the heir of him that made the conveyance will declare, *firſt*, That he has no intereſt. *Secondly*, That the conveyance in truſt is good; and, *thirdly*, That the truſt is not within the act. And in the end muſt only pay coſts, if decreed againſt him. And,

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Fourthly, As to the next proteſtant of kin, &c. ſhould he come to pray a ſale of part, and to have the profits of the reſidue, &c. in that caſe no court may decree the whole to be ſold. So he will fare no better.

Firſt, But we will ſuppoſe it depending in chancery (which may be a long time firſt, and longer before it come before a Maſter, and longer ſtill before a decree); yet fair bidders may be wearied, &c. by bidders of their own, and (if theſe will be ſturdy) out-bid
*[194] at laſt: and (where nobody's intereſt is to *follow it) eaſily fly off; or if they do not, yet the papiſts paying their own money, receive it again themſelves, and take a conveyance in the name of their own truſtees: and if this be undiſcovered, all is well; or if it be diſcovered, the conveyance, it is true, is void by the act; but then it reveſts again in the firſt owner or truſtees; and the conſequence is, that

They are to begin the ſame round again; nor can I ſee any end this way, where it is nobody's buſineſs, intereſt or inclination to ſue; ſo that the management of the cauſe may continue for ages. To which no end is likely to be put.

Secondly, But ſuppoſe the three thouſand pounds debts and legacies paid by perception of the profits before there can be a ſale; or ſuppoſe one that has the ſurplus buys them off (as he may well do, if they are not within the act): and if by either of the ſaid ways he becomes the ſingle owner of the ſaid truſt: what is the nature of his intereſt now?

He has now the entire truſt of the land, the rents are merely his, &c. Has he yet no intereſt or profit out of the land? Who ſhall have the management or power over the tenants, if not himſelf? And the eſtate of the truſtees is now not in the leaſt for their own advantage, but for the benefit of papiſts.

Thirdly, This will open a way, not only for a papiſt to take by deviſe, but to buy or purchaſe this ſort of ownerſhip of others; for what is not within the act may as well be bought as given. Which ſort of expoſition will, I apprehend, overturn the act, and will have no other effect, but that ſome very learned and ingenious gentlemen, who attend here upon this occaſion, muſt, or will for the future, dreſs up their truſts in a new form.

I own, with me, it is a difficulty to ſay, that ſuch a truſt as this is neither tenement, hereditament, eſtate, term, nor any other intereſt or profit whatſoever out of land; and I know not whether, to ſhut this out of the act, I muſt not go farther and ſay, that this eſtate in fee in the truſtees is not any land, tenement, hereditament, or any intereſt or profit whatſoever. For, if it be any of theſe, it is plainly in truſt for the benefit of perſons profeſſing the popiſh religion, and therefore within the clauſe and proviſion of this act.

To

To prove this not to be within the act, great variety of arguments have been uſed. And they ſay, that the arguments * on the other ſide prove too much, and tend to great hardſhips, *viz.*

* [195]

FIRST, That this would diſable a papiſt to make proviſion for his younger children, if ſuch a truſt to make or raiſe their portions were void.

SECONDLY, That it would avoid a proviſion for popiſh executors, &c. and they would therefore diſtinguiſh upon the act, and ſay,

THIRDLY, That the act only intends the continuing of eſtates in papiſts, and that here all is to be ſold, and by conſequence there is no continuing intereſt in the land.

FOURTHLY, That the act only intends real eſtates, but that this is money, and merely perſonal; and as an inſtance ſay, a mortgage in fee till foreclоſed, the money is in equity perſonal eſtate, and ſhall go to the executors.

FIFTHLY, That eſtate, term, intereſt, and profit out of land, mean only perception of profits, and not money to be raiſed by ſale of the land.

And they argued further and ſaid,

SIXTHLY, That a man may ſell his land, and give the money to a papiſt; and therefore he may appoint another to ſell it, and to give the money, &c. *Qui facit per alium, facit per ſe.*

SEVENTHLY, That this anſwers the intent of the act, to turn popiſh lands into money.

Before I anſwer theſe particulars, I would obſerve in general:

Firſt, That the arguments uſed of the hardſhips to papiſts are of little force againſt an act of parliament which is profeſſedly intended to bring hardſhips upon them.

Secondly, That the diſtinctions which have been offered do not ariſe from any words in the act, but from ſome gueſſes at what may be thought too hard or unfit, which I think cannot controul the expreſs words; for that would indeed be repealing the act inſtead of conſtruing it.

Thirdly, That the words in this act are contrived on purpoſe to exclude all diſtinction, and ſeem very ſtrong for that purpoſe, *viz.* "all eſtates, terms, or any other intereſt or profit whatſoever "out of land." So that, let it be long or ſhort, permanent or tranſitory, deſcendible or teſtamentary, of what nature or kind ſoever, or whatever intereſt or profit it be, if it come out of land, it ſeems compriſed within the expreſs words of this act.

Fourthly, That if this be a deſcendible intereſt, as I have endeavoured to ſhew, all thoſe arguments fall; though I ſhall endeavour * to ſhew them inſufficient, were it no deſcendible intereſt.

* [196]

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Fifthly, That in no caſe is any diſtinction to be admitted in expounding an act of parliament, which opens a way to deſtroy the act; as I think this would.

So that ſhould I not ſatisfactorily remove all the difficulties objected, yet they would not be of weight to alter the words and natural conſtruction of the act.

But to the foregoing objections I give theſe particular anſwers, *viz.*

FIRST, The act does not diſable a papiſt from making any proviſion for his younger children which they are enabled to take; but thoſe which they cannot take, he cannot make for them; as a rent-charge, or a leaſe of lands, and as I conceive, a truſt of lands.

But what is the conſequence of this, that they muſt not be provided for? No, but muſt be provided for in a proper method, *i. e.* let him give them money; if he has it not, why does he pretend to keep his land when he wants money for the occaſions of his family?

This is a proper method to attain one end of the act, *i. e.* to work papiſts out of their lands; and putting a neceſſity upon them to ſell, is agreeable to the end and deſign of the act. If he ſell the land or intereſt therein himſelf, it is certainly done; but if he raiſe a truſt, it will perhaps never be done, or paid off by the popiſh heir, &c.

So that this is ſo far from being an objection, that it is an argument that the act ſhould extend to it.

SECONDLY, As to popiſh executors, &c.

ANSWER. Firſt, They cannot take leaſe or grant, and conſequently not mortgage. This is within the expreſs words of the act; for it is an intereſt in land; and on non-payment the eſtate is abſolute in law; and his intereſt is good in equity to intitle him to receive and enjoy the profits till redemption or ſatisfaction; and on a foreclоſure he has the abſolute eſtate both in law and equity.

Secondly, That the hardſhip is to perſons the law intended a hardſhip to.

Thirdly, That it is not ſo hard as to avoid any purchaſe. For it is what was not contracted for, or relied upon.

* [197] * THIRDLY, It is ſaid, the act only extends to continuing eſtates, &c.

ANSWER. Firſt, No ſuch diſtinction is in the act, which ſays all eſtates and intereſts whatſoever. Secondly, This may neceſſitate ſales to provide for children, &c. Thirdly, It is a continuing intereſt. It is true, the ſale, when it happens, may determine it, but that alters not the nature of it in the mean time: And how long ere that may be, God knows. It may continue unſold for ever (and perhaps ſo intended).

FOURTHLY,

FOURTHLY, It is objected, that the act only intends real eſtates, and that this is perſonal, &c.

ANSWER. Firſt, No ſuch diſtinction in the act, nor any words that countenance it; but *è contra*, all terms are expreſsly within it, which are perſonal, and go to executors. Secondly, In a mortgage in fee deſcended to the heir, and unforecloſed, the heir is a truſtee for two perſons, *viz. Firſt*, For the executor as to the money, which is a particular truſt carved out of the whole truſt of the fee, like a term for years out of an inheritance; and, *ſecondly*, For the mortgagor as to the reſt of the truſt, who therefore has the inheritance of the truſt. But though in that caſe the truſt for the executor is not an inheritable truſt, yet it is really a (continuing) truſt in that land for the mortgagor, though of another nature; as he that has a term for years has as really an intereſt in the land, as he that has the reverſion, though of another kind; and though the one be deſcendible and the other teſtamentary, it amounts but to this: it will be money after the ſale; and what now affects the land, will by the ſale affect the money.

So if a man by will gives power to his executors to ſell land and pay the money to his heir, till the ſale the heir has a fee therein; though when the executors have executed their power, it will be turned into money.

So in *Abbot and Barton's Caſe* before cited, there was a power to appoint any eſtates, even the fee, to other perſons; but yet till that was done, and the uſe limited to the party and her heirs, it was the old uſe deſcendible to the heirs on the part of the mother.

But, ſecondly, All rents and profits of lands, when received, will be money or goods, and yet the right to them before-hand is within the act, and is an intereſt in the land.

THE FIFTH OBJECTION, That the words eſtates, terms, intereſts, &c. mean only perception of the profits, &c.

ANSWER. Firſt, Here is a right to have an account and benefit of rents and profits till ſale; and the ſale only goes in defeaſance * of that right. Now, how far off this ſale may be I know not; and here is a direct power over the tenants in the mean time. * [198]

Secondly, What eſſential difference is there between rent and money on ſale as to the preſent point? A rent is the price for which the profits of the land are ſold for one year, and a fore-hand rent is properly a taking up the profits of land by anticipation; and on a ſale all the profits of all future years are ſold, and the party receives the price, which is receiving the profits by anticipation; and no diſtinction is between fore-hand-rent and after-rent; they are both the profits of the land: profits taken yearly come in all in a lump on a ſale; and the right to the one or the other is a right to the profits out of the land.

ROPER *against* RADCLIFFE.

And therefore, where a truſt has been to raiſe money out of the rents and profits of lands; and the rents are ſo ſmall, that to raiſe it by perception of them would not anſwer the purpoſe of the truſt; the courts of equity have with great juſtice decreed a ſale, becauſe that is ſtill a raiſing out of the profits, though taken ſooner by anticipation.

THE SIXTH OBJECTION, That what a man may do himſelf he may do by another, &c.

ANSWER. This rule is right, provided no law hinders; but here the act of parliament hinders; he may receive the rents of his eſtate twenty years together, and pay them over to a papiſt; but can he therefore make a leaſe to another for twenty years, on truſt to receive the rents and pay them over to a papiſt? The difference is plain: In the one caſe he creates a truſt for a papiſt, and gives him a right to demand the profits of the land; in the other caſe, the papiſt receives only the money from him, but never had any demand out of the land.

THE SEVENTH OBJECTION, That this will anſwer the end of the act, *i. e.* turn papiſts eſtates into money.

ANSWER. No. Firſt, This will defer and prevent doing it. It will deliver him from the neceſſity of doing it; otherwiſe he muſt have done it himſelf, and then it had been over; but by this way the doing it is delayed, and perhaps it will never be done.

Secondly, This brings the intereſt of unſold lands to the papiſt, and creates in him a new intereſt to the land, and a power over the now tenants.

Thirdly, This goes to ſell them, not while they are in popiſh hands, but when they are deſcended to a proteſtant heir. * It is, in effect, a diſinheriting a proteſtant heir, that a papiſt may have the benefit; which ſurely was never the intent of the act.

* [199]

Fourthly, This would be the ſame as if the truſt had been created by a proteſtant; for if this be not an intereſt within the act, a papiſt may purchaſe it from a proteſtant, as well as have it given him by a papiſt. Nor will it be material from whom the eſtate comes.

THE EIGHTH OBJECTION. But it may be further ſaid, that all my objections ariſe from the non-performance of the truſt, which is not to be ſuppoſed; and that a court of equity ought rather to judge of it as if it were performed.

ANSWER. My objections ariſe, firſt, from the expreſs words of the act; and, ſecondly, from the manifeſt inconvenience if they are departed from.

And as to the ſuppoſing a performance, obſerve:

Firſt,

First, There muſt neceſſarily be ſuppoſed a time when it was unperformed, or there is no room for a performance; and at that time a papiſt had a demand out of, and intereſt in, the land.

Secondly, I cannot ſuppoſe a truſt to be performed which nobody has any neceſſity, intereſt, or inclination, to perform.

Thirdly, The truſt is to pay out of the profits. Paying out of the yearly rents is no performance in effect. And a ſale is the only way to perform it. But that is not done.

THE NINTH OBJECTION. Well, but a cure may perhaps be propoſed for the inconveniencies I have objected; as, that if there appears any fraud, a court of equity will ſet that right, or they may give another conſtruction in ſuch caſe.

ANSWER. We are not here upon a law made to prevent any act in itſelf fraudulent or injurious; and if ſo, yet the evading of this would but occaſion the committing of the ſame fraud another way, and therefore to be met with in the firſt inſtance.

Nor are we upon a law which prohibits ſomething under the penalty of a forfeiture to a third perſon; though in that caſe perhaps a fraud to deprive ſuch perſon of a title given him by ſuch an act would be met with.

But this act is a bare diſability; and if a man be diſabled to purchaſe one ſort of eſtate or intereſt, it is no fraud to purchaſe another ſort of intereſt which he is not diſabled to purchaſe; nor to take care, before he pays his money, * that the ſeller has an intereſt of ſuch a nature as he can purchaſe. * [200]

Beſides, here he has no ſtranger to deal with, but ſimply the perſon he buys from, who being a party to all that is done, and not ſurprized or drawn in, but honeſtly and fully paid, can never complain of fraud.

Nor do I apprehend, that the greater or leſſer proportion of the ſurplus can be material, if the act extend not to an intereſt of that kind.

Nor can the management of the eſtate afterwards weigh anything; for this act creates only a diſability, but makes no forfeiture; it prevents a veſting, but deveſts nothing veſted; and if the truſt is admitted to be theirs, it is too late to diſpute with them about the management of what is their own.

SECOND ARGUMENT.

I AM, it ſeems, in this caſe, ſo unfortunate as to differ from ſome of my brethren; they holding,

FIRST, That this caſe being on a will is not with the act; and,

SECONDLY, That if it were, yet this method will not determine it.

ROPER *against* RADCLIFFE.

This only opens a way to a further labour to conſider,

Whether a gift by will be within the act, or not?

Now conſider, firſt, By the firſt expreſſion in this clauſe, "every perſon being a papiſt, or profeſſing the popiſh religion, "is diſabled to purchaſe." And,

Secondly, By the ſecond, "all eſtates made to any ſuch perſon "are declared void." And here being in neither expreſſion any reference to any one manner of conveyance, there ſeems no room for a diſtinction, whether it be by fine, or by deed, or by will, &c. But here is a general incapacity of all manner of conveyances; and all eſtates, howſoever or by whomſoever made, are declared void, if made to ſuch perſons after ſuch a time.

This ſeems to me to be the clear ſenſe of the words.

But the objection conſiſts of two parts; if either of which fail, it falls to the ground.

FIRST, It is ſaid, that the firſt expreſſion does not import any diſability to purchaſe in a proper or legal ſenſe, but only a diſability * [201] * to purchaſe for a valuable conſideration, which is ſaid to be the vulgar and common ſenſe of the word.

SECONDLY, That thoſe words which make eſtates void, if made to ſuch perſons, mean not ſuch perſons as profeſs the popiſh religion (generally), but only ſuch purchaſing papiſts.

And conſequently that the plaintiffs, not having paid any valuable conſideration, but this truſt being given to them freely by a will, this caſe is not within the act of parliament.

I hold both theſe propoſitions to be wrong; though if either be ſo, the concluſion will fall.

Firſt, A purchaſer is a law term, and imports any eſtate which is not caſt upon a man by act of law (as deſcent or eſcheat); but which he takes or accepts by conveyance for money or other conſideration, *vel aliâ quâvis fortunâ* (ſays *Sir H. Spelman*), or freely of gift (ſays my *Lord Coke* expreſsly), *Litt. fol.* 12. 1. *Inſt.* 18. *a. b.* And thus it has been conſtantly uſed by all lawyers for ſome hundreds of years without interruption.

Not to multiply particulars, let me inſtance in the manner of expreſſion of that known rule which is in every lawyer's mouth, as mentioned by that very accurate Judge *Lord Hobart*, in *Counden and Clark's Caſe*, *Hob.* 30.

"This is a poſitive rule, that a man cannot raiſe a fee-ſimple "to his own right heirs, as a purchaſor, neither by conveyance of "land, nor by uſe, nor by deviſe."

Mr. Attorney would ſeem to imagine a difference between the words "to purchaſe," and "to take by purchaſe;" but it is clear they

they are all one, and the verb "to purchaſe" is conſtantly uſed in the ſame ſenſe as "to take by purchaſe;" and in 1. *Inſt.* 2. *a. b.* it is uſed ſo near a dozen times. And, ROPER against RADCLIFFE.

The general licences to abbies after the ſtatute of *Merton* are generally only leave to purchaſe (ſo are charters to corporations); but no one ever doubted, but that thereby they might take what was given them, as well as what they ſhould buy and pay for.

And here all the conjugates are uſed in the ſame ſenſe as the word *purchaſor*, which is *nomen verbale*, and being formed from that verb, *to purchaſe*, it is naturally and properly to be uſed in that ſenſe,

I will mention but one inſtance where that word is uſed in a ſtatute in the ſame ſenſe (though in another form of expreſſion) on the rule before cited out of *Hobart*. It is in *Pybus and Mitford's Caſe*, 1. *Vent.* 372. where WILD, *Juſtice*, ſays, * I agree, a man cannot, either by conveyance at common law, limitation of uſes, or by deviſe, make his right heir a purchaſor. * [302]

Surely laws are to be underſtood according to the language of the law, and a law term in an act of parliament is to be taken in its legal ſenſe.

The ſtatute 15. *Rich.* 2. c. 5. takes notice, that mayors and commonalty of cities and boroughs, and other towns which have a perpetual commonalty, be as perpetual as people of religion; and therefore firſt expreſsly extends the ſtatute *de Religioſis* to them in theſe terms: "from henceforth they ſhall not purchaſe to them and "their *com.* upon pain contained in the ſaid ſtatute *de Religioſis*."

And it was never doubted but that it would extend to what ſhould be given to them, as well as to what they ſhould buy.

I agree, that purchaſors for valuable conſideration have been diſtinguiſhed from others in ſeveral acts of parliament, by proviſions made particularly for them, that they ſhould not loſe their money; or by exceptions to prevent their being involved in general proviſions againſt fraud; but were never diſtinguiſhed to their loſs or prejudice, nor ever ſingled out to loſe their eſtates becauſe they had paid for them. Nor do thoſe acts of parliament which are in their favour ſpeak of them as of purchaſors generally, but only as of one ſpecies of purchaſors, *i. e.* purchaſors for valuable conſideration in expreſs terms; as,

The ſtatute 27. *Eliz.* c. 4. againſt fraudulent and covinous conveyances, *ſect.* 1. recites the loſs the ſubject may have after *purchaſes* made, &c. of lands, &c. for money and other good conſiderations; *ſect.* 2. makes fraudulent conveyances void againſt perſons who ſhall purchaſe for valuable conſiderations; *ſect.* 8. makes ſtatutes not entered in due time void againſt perſons who ſhall purchaſe for money or good conſideration,

The

Rules against Bankrupts.

The ſtatute 21. *Jac.* 1. c. 19. of Bankrupts, *ſect.* 14. provides, that no purchaſer for good and valuable conſideration ſhall be impeached by that act, unleſs the commiſſion be ſued out within five years. And the ſtatute of Frauds and Perjuries, *ſect.* 15. is, that judgments, as againſt purchaſors *bona fide* for valuable conſiderations, of lands to be charged thereby, ſhall in judgment of law be judgments only from the ſigning: and, *ſect.* 18. no recognizance * [203] ſhall bind any land, &c. in behalf of any purchaſor *bona fide*, and for valuable conſideration, but from the time of the inrolment.

I agree, if a gentleman at the bar were arguing on the ſtatute 27. *Eliz.* againſt a fraudulent conveyance, and ſhould ſay, that his client was a purchaſor, I ſhould underſtand him to mean a purchaſor for a valuable conſideration; not becauſe the words *ex vi termini* import it, but becauſe the occaſion of his uſing it ſhews that to be his meaning, or he talks nothing to the purpoſe.

But the caſe is different when we have under conſideration the proper ſenſe of the words of an act of parliament, where no declared meaning in any other part of the act determines the intent, but we are to judge upon the enacting part, what they have done, and only thence are to learn their intent, and what they deſigned to do; for there of neceſſity the act muſt be underſtood always to ſpeak properly, and in the language of the law.

But ſhould I admit, that an act of parliament providing againſt frauds and artifices to defraud purchaſors is to be confined only to purchaſors upon valuable conſiderations, though not ſo expreſſed; for that purchaſors by free gift can hardly be ſaid to be defrauded in the language of the law; for if the gift be defeated they are but where they were, and ſo the ſubject-matter may ſupply the diſtinction omitted in the words:

Yet here is no ground or reaſon for the diſtinction; it is all one, as to the end and intent of this act, whether the lands were paid for, or not.

If the law-makers looked upon lands in papiſts hands as the ſupport of popery, and to ſtop the growth thereof, and the miſchief the owners might do the public, thought it reaſonable to make proviſions againſt their further acquiſitions, Is it at all material whether thoſe acquiſitions were paid for, or not? One hundred pounds *per annum* acquired by a papiſt by a voluntary gift or will, will be as prejudicial to the public, and as much againſt this act, as where he has paid two thouſand pounds for it.

Nay, I take it it will be more ſo; for then he has the land, and keeps his money too, &c.; and if he has gotten a new ſword, &c. it will do as much execution when given him as if he paid for it.

* [204] * The miſchiefs intended to be remedied are the rule whereby acts of parliament are to be expounded, and the words are ſtretched,

if

if there be occaſion to reach them all. But it is very hard to reject the proper, natural, and legal ſenſe of the words in any caſe, much more when it will ſo plainly let in an equal miſchief. Attorney-General against Lancaſter.

The firſt ſtatute of Mortmain ſpeaks only of religious perſons. Now among all the reaſons or expoſitions of thoſe laws it was never pretended, that paying no conſideration excuſed them.

The ſtatute 15. *Rich.* 2. *(ſupra)*, ſpeaking of lay communities, forbids only purchaſors generally; and yet it was plain the law-makers looked on them as equivalent. The conveyance in mortmain was the thing in view, whether a price were paid or not, and what was the motive was not material.

To give a much ſtronger inſtance: The ſtatute of *Magna Charta* c. 32. *(Nullus liber homo debet de cætero amplius, &c.)*, expreſſes both give and ſell: but not expreſsly preventing the miſchief to the lords, it was extended by conſtruction.

Alſo the ſtatute 18. *Edw.* 1. *Quia Emptores*, enacts, that from thenceforth it ſhall be lawful for every freeman to ſell, &c Now here was fair room for a diſtinction, that this ſtatute ſets the freeholders free from *Magna Charta* where they ſell, but not where they give; becauſe the ſtatute only gives liberty to ſell, and *Magna Charta* expreſsly forbids giving as well as ſelling; but the act being a proviſion for the lord, and the price being between the parties only, and the miſchief of giving being the ſame as to him, it has been extended thereto.

And *Litt. ſect.* 40. ſpeaking of this act, ſays, that it was thereby ordained, that no man ſhould alien or (give) grant lands or tenements in fee-ſimple, to hold of himſelf: and that the word *ſale* extends to gifts (Q.).

So here the care is for the public, and to prevent papiſts from getting new acquiſitions. What is paid is only between the grantor and grantee, but does not concern the public at all. And therefore, &c. no reaſon to form a diſtinction here.

But we are not contending to enlarge the ſenſe of the word (*purchaſe*), but only to underſtand it in its true, genuine, proper, and legal ſenſe. And,

* Thirdly, There is ſtill leſs room for this diſtinction, becauſe the ſubject-matter of this clauſe is properly an incapacity or diſability. * [205]

Acts of parliament are always expounded according to the rules and reaſon of the common law; and when a proviſion is made by act of parliament, the law endeavours to range it with ſome proviſions of its own of like nature.

The ſtatute *De Donis* enacts, that tenant in tail *non habeat poteſt. alienandi terram datam*, ſo as to prevent its coming to his iſſue; and that a fine thereof *ſit in ipſo jure nullus*. Now the end

and

Rooke against Radcliffe.

and effect of this ſtatute is a diſability to alien to the prejudice of others; and therefore the law now ranks him with biſhops and other eccleſiaſtical perſons, and with huſbands, who by the common law were diſabled to alien to the prejudice of their ſucceſſors and wives.

And therefore, though the act be, that tenant in tail ſhall not have power to alien, and that his fine ſhall be void; yet it was conſtrued, that his fine was not void, but made a diſcontinuance, and put the iſſue to his formedon; and that his other alienations either put the iſſue to his action, or allowed his entry, juſt as the law ſtood before in relation to biſhops.

Now here by this clauſe an incapacity or diſability is brought upon a papiſt. Then inquire, Has the law any ſpecies of incapacity with which to rank this? Yes; for capacity and incapacity to purchaſe is a ſettled notion therein, and therefore papiſts are to be conſtrued to be in the ſame condition with thoſe who were under an incapacity to purchaſe at common law. And whatever diſtinction might be between one purchaſor and another in reſpect of the conſideration and other circumſtances; there never yet was any between one incapacity to purchaſe and another; and a man under ſuch incapacity was no more capable of lands given him than of lands bought; and if this act be conſtrued according to the reaſon of the common law, a papiſt is in the ſame caſe.

And upon the whole, I think that the word *purchaſe* here does by no means make a valuable conſideration neceſſary.

But if there could any doubt remain; yet,

SECONDLY, The later words leave no room for any diſtinction upon the point of the conſideration; they are plainly * more general, and I apprehend more extenſive than the former; and therefore if there were any doubt upon the word *purchaſe*, *i. e.* whether the larger or narrower ſenſe of the word ſhould be taken, it muſt now be in the larger ſenſe; becauſe the ſenſe of thoſe later words in the act is at leaſt as large as the largeſt ſenſe of the word *purchaſe*; and there can be no other uſe of them but to ſupply the defect or narrowneſs of the former words.

* [206]

Therefore I ſhall not contend that it is an independent clauſe: I content myſelf to have it admitted to be an explanatory or ſupplemental clauſe, as the words therein, "ſuch perſon or perſons," muſt be explained to be perſon or perſons profeſſing the popiſh religion, *i. e.* ſuch perſon or perſons as are ſpoken of before.

This is the natural ſenſe; but to conſtrue "ſuch perſon or perſons" to be ſuch purchaſing papiſt is harſh, and I think not to be ſuppoſed either from the grammar or the context; for the word *ſuch* refers to a precedent deſcription, and conſequently to the circumſtances he is before deſcribed by; and not to make words mentioned in his puniſhment to be a neceſſary part of his deſcription.

Suppoſe

Suppoſe the firſt diſability had been a diſability to ſue or bring an action, and the clauſe had run thus, that "all and every papiſt, "or perſon profeſſing the popiſh religion, ſhall be diſabled and made "incapable to ſue or bring an action, and that eſtates made to ſuch "perſon or perſons ſhould be void;" would theſe laſt words be expounded only of ſuch perſons as ſhould ſue or bring actions? No ſurely; the different puniſhment inflicted can make no difference in the deſcription of the perſon.

I cannot better illuſtrate this than by the common method uſed in paſſing bills in parliament, *i. e.* to bring them in with blanks for times and penalties. And ſo this clauſe in the bill would run, when firſt brought in, thus:

"And that from and after every papiſt, or perſon "profeſſing the popiſh religion, ſhall be diſabled, and is hereby "made incapable, &c. And that all eſtates, terms, intereſts, or "profits whatſoever out of lands, from and after , to be "made, ſuffered, or done, to or for the uſe, &c. of any ſuch per-"ſon or perſons, or upon any truſt or confidence, to or for the "benefit or behalf of any ſuch perſon or perſons, ſhall, &c."

As it ſtands here, the words "ſuch perſon or perſons" are plainly ſuch as are deſcribed in the beginning of the clauſe, and are uſed to ſave the repetition of that which is in the foregoing * deſcription. * [207]
Is it poſſible now to think, that the filling up of the blanks can alter the deſcription of the perſons; and that one ſort of perſons will be meant if one puniſhment be inſerted, and another ſort if another? or,

That if the firſt blank be filled up with a diſability to ſue, that the laſt clauſe only affects eſtates granted to plaintiffs; or if with a diſability to bear an office, only eſtates granted to officers; or if with a diſability to be an executor, only eſtates granted to executors?

No; the deſcription was full and complete at the firſt; the ſame perſons are the ſubjects of both parts of the clauſe; and whether the blank be filled up with one ſort of puniſhment, and the ſecond with another, or whether the ſecond be only an inforcement of the firſt, it will be all one.

Beſides, if you would refer it to puniſhment, it ſhould be ſuch papiſt as is diſabled to purchaſe, and not ſuch papiſt purchaſing, for there is no purchaſing papiſt ſpoken of.

But the former expoſition operates not only upon purchaſing papiſts, but upon all: all are immediately *ipſo facto* diſabled, and the act has its effect upon thoſe who are thereby deterred and reſtrained from purchaſing as fully and as properly as upon thoſe who ſhall attempt to purchaſe and loſe; and more agreeable to the intent of the act, which ſeems to aim at prevention rather than forfeiture. It ſeems then very ſtrange, that the later words ſhould not extend to all papiſts too.

In

Royal Hospital

In the ſenſe wherein I take them, the later words are very uſeful and proper; they enlarge the former words, if they are too ſhort, or, by uſing words not ſo capable of diſtinction, remove the ambiguity.

And the preſent queſtion ſhews it was very fit to put them in for that purpoſe. But in any other ſenſe they are vain, and increaſe the doubt inſtead of removing it.

And to look more narrowly, the word *relief* in the later expreſſion ſeems calculated for a gift, as an eſtate given or provided for children, relations, or any in want, is properly ſaid to be for their relief; but an eſtate in land which a man buys can never be ſaid to be for his relief; he has only altered the nature of his eſtate, and is not a jot the richer. Q.

[208] * OBJECTION, That deviſes are not within this clauſe; for that

* Firſt, They are mentioned in the former clauſe, and dropped in this; and,

Secondly, If they be, this clauſe claſhes with the former, and makes an abſolute diſability in the ſame caſe where that makes only a qualified one.

ANSWER. Deviſes are not dropped in this ſecond clauſe. It is true, they are not named therein, nor indeed could they be as that clauſe is penned; but it is plain they are meant and implied in it.

Had the ſecond clauſe made all fines, feoffments, grants, releaſes, &c. to papiſts void, and had omitted deviſes, it might have been juſtly ſaid, that deviſes were dropped, or excluded, in it.

But here the general words of this ſecond clauſe being relative to the former, it is plain deviſes are included in thoſe relative words, deviſes being expreſsly mentioned in the antecedent clauſe, to which this ſubſequent does relate.

CASES

CASES

IN

The COURT of CHANCERY,

FROM

MICHAELMAS TERM

IN

THE TENTH YEAR OF GEORGE THE SECOND,

TO

MICHAELMAS TERM

IN

THE TWENTIETH YEAR OF GEORGE THE SECOND.

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THE TWENTIETH YEAR OF GEORGE THE SECOND,

Lord Hardwicke, *Chancellor*.

Evit *againſt* Williams and Others. Caſe 77.

At the Rolls, November 2d, 1739.

ONE *Farr*, poſſeſſed of a long term of a perſonal eſtate of five thouſand pounds, by will directed that after payment of ſeveral legacies, &c. the reſt and reſidue of his perſonal eſtate ſhould be ſet out at intereſt by the defendants *Mary* his wife and his friends *John Areland* and *Thomas Haſſall*, "for the uſe "and benefit of the ſaid *Mary*, and of ſuch child and children "which ſhe ſhould be *enceinte* with at the time of his deceaſe; and "in caſe ſhe ſhould die *without iſſue by him, upon her death* he "gave the ſame to *Anne* and *Phillippa Evit*, the plaintiffs; and in "caſe they ſhould die before his ſaid wife, then he gave the ſame "to his ſiſter."

If *perſonalty* be deviſed to a wife and ſuch child as ſhe ſhall be *enceinte* with at her huſband's death, and in caſe ſhe die without iſſue by him, upon her death a deviſe over; this is a good *executory deviſe*.

EVIT *againſt* WILLIAMS AND OTHERS.

Mary his wife had not any child, nor was *enceinte* with any at the teſtator's death, but afterwards married *Williams*, one of the defendants. *Anne Evit* died, and left her real and perſonal eſtate to the plaintiff *Phillippa Evit*, her ſiſter, and made her executrix.

The bill was brought to have an account of what eſtate would remain after payment of the teſtator *Farr*'s debts, &c. and to have it ſet out at intereſt by the truſtees in the will, and to compel ſecurity from *Williams* and *Mary* his wife, for the plaintiff to enjoy the reſidue, as by the limitation over to her.

THE QUESTION was, Whether the deviſe over to *Anne* and *Phillippa Evit* was good, or not?

Eq. Caſ. Abr. 191. (4). 2. Lev. 290. 2. Chan. Rep. 4.

The great objection by the defendants was *Mary*'s dying without iſſue; that thoſe words extended, ſo far as to endanger a perpetuity; and therefore the remainder to *Anne* and *Phillippa Evit* was void; for the wife of the teſtator might have had iſſue in the underſtanding of the law to a hundred or a thouſand years to come; for grandchildren, great-grand-children, &c. are "iſſue;" and that the remainder over being of a chattel cannot depend upon a poſſibility ſo remote as the dying without iſſue, becauſe of an apparent tendency to a perpetuity.

Eq. Caſ. Abr. 191. Fearne, 371. 3. Pr. Wms. 262. 4. Bl. Com. 175.

THE MASTER OF THE ROLLS held, that this was an *executory deviſe*, and that limitations over of perſonal things are good, where the contingency is to happen in the compaſs of a life or lives *in eſſe*; for then there is no danger of a perpetuity, which was one great miſchief apprehended from theſe kind of limitations; that if the dying without iſſue in this caſe was to be underſtood in a ſenſe ſo enlarged as the defendants contended for, then he allowed the limitation void; but he held, the "dying without iſſue" here muſt be at the time of *Mary*'s death; for the words are, "and if "ſhe die without iſſue by me, upon her death I give the ſame to "*Anne* and *Phillippa Evit*;" ſo that the contingency is to happen within one life *in eſſe*, which is *Mary*'s; and that the contingency is already come to paſs, for as *Mary* was not big with any child by the teſtator, the limitation over is good; but had there been a child to take jointly with the mother, the remainder over would have been void, for then there would have been a danger of a perpetuity. You take away the objection; for by taking away the child you take away the danger of a perpetuity; and therefore the remainder good.

And A DECREE was made for the plaintiff.

Caſe 78. Garbut *againſt* Hilton and Others.

At the Rolls, Michaelmas Term, 13. Geo. 2. November 26, 1739.

On a deviſe of ſo much money to a *feme ſole*, "provided ſhe "marry with "the conſent of her father and mother, or the ſurvivor of them;" the marriage is a *condition precedent* to the payment of the legacy.—S. C. 1. Atk. 381. S. C. 1. Vezey, 5.

PHILLIPPA DOWNS, by will, deviſed to *Jane Garbut*, the plaintiff, a legacy of two hundred pounds, provided ſhe married with the conſent of her father and mother, or the ſurvivor of them.

The

CARBUT *againſt* HILTON AND OTHERS.

The plaintiff *Jane* before any marriage, and living her father and mother, brought her bill againſt *Hilton* and others, as executors to *Phillippa Downs*, for the two hundred pounds.

THE QUESTION was, Whether or no this was a veſted legacy, the plaintiff being not married, and her father and mother living?

IT WAS SAID *for the plaintiff*, that as there was no deviſe over of the legacy, and as it was payable out of the perſonalty, the condition was *in terrorem* only to intimidate the legatee from behaving imprudently in her marriage, and therefore void (*a*); and conſidering the legacy without any condition at all, it muſt be a veſted one; that by the civil law ſuch a legacy not to marry without conſent is void, though there be a limitation over; for the maxim there is, *Maritagium eſſe liberum*; that there would be many caſes where ſuch a condition not to marry without conſent of the father and mother would be extremely hard; as where the father and mother ſhould die before any competent match ſhould offer, or where they ſhould not be in humour to conſent, or where one ſhould conſent and the other not.

THE MASTER OF THE ROLLS was clear, that this legacy was not veſted; that it was payable after marriage, but not till then; that if the plaintiff had married without conſent, then would be the time to bring her bill, and diſpute whether the condition was *in terrorem* only, and void; that in all the caſes cited, except 2. *Vern.* 452. the bill was brought after marriage; that if the condition be *in terrorem*, yet marriage in this caſe is abſolutely neceſſary before the bringing a bill, unleſs it was to be under the ſame circumſtances as that in 2. *Vern.* 452. and *Nelſon Chan. Rep.* 62. of never intending to marry, and of giving ſecurity to refund if the condition ſhould be broken. HIS HONOUR was much directed by a caſe in *Swynb.* 246. and another in *Godolph.* 381.

And he diſmiſſed the bill (*b*).

(*a*) See Aſton *v.* Aſton, Prec. Chan. 226.

(*b*) Atkins *v.* Hiſcocks, 1. Atk. 500. S. C. 2. Vezey, 5. Pullen *v.* Ready, 2. Atk. 590. Elton *v.* Elton, 1. Wilſ. 159. Hemmings *v.* Munckley, 1. Bro. C. C. 303.

Sheldon *againſt* Sheldon. Caſe 79.

Rolls, Michaelmas Term, 13. *Geo.* 2. *November* 26, 1739.

A GAVE a legacy of fifty pounds to *B.* payable two years after *A.*'s death. *B.* made his will, and gave all his perſonal eſtate to *C.* and made him executor. *B.* died within the two years. *C.* brought his bill againſt the executors of *A.* for the fifty pounds.

If a legacy be given to *B.* payable two years after the teſtator's death, and *B.* dies within the two years, yet his executors are intitled to the legacy.

SHELDON *againſt* SHELDON.

And THE MASTER OF THE ROLLS decreed for the plaintiff, and ſaid, that where a legacy is deviſed to one generally, to be paid or payable at any age, or two years, or any other time, after the death of the teſtator, and the legatee dies before that age, or within that time, yet it is ſuch an intereſt veſted in the legatee, that his legatee, executor, or adminiſtrator, may ſue for and recover it; for it is *debitum in præſenti*, though payable *in futuro*, the time being annexed to the payment, and not to the legacy itſelf: and would have no caſes cited.

(*a*) See Cloberry's Caſe, 2. Vent 342. Collins *v.* Metcalf, 1. Vern. 462. Gordon *v.* Raynes, 3. Peer. Wms. 138. Dawſon *v.* Dawſon, 1. Brown's C. C. 119. and 2. Fontblanque's Equity, 372. and the caſes there cited.

Caſe 80.

Boughton *againſt* Boughton.

Lincoln's-Inn-Hall, December 5, 1739.

A father makes a voluntary ſettlement on his family, without power of revocation inſerted, and afterwards makes a contrary diſpoſition by will, this will not affect the former ſettlement.

S. C. 1. Atk. 625. Prec. Chan. 182. 2. Vern. 473. 2. Peer. Wms. 359. Amb. 264.

EDWARD BOUGHTON, father to the five young ladies the plaintiffs, ſettles his eſtate on himſelf for life; remainder to his wife for life for her jointure; remainder to the firſt and other ſons in tail; and in default of iſſue male, limits a term of five hundred years to truſtees to raiſe two thouſand pounds a-piece for all ſuch daughters he ſhould have; remainder to his own right heirs.

Edward had iſſue only daughters, the plaintiffs, and having in himſelf a remainder to his own right heirs, makes, 15 *February* 1733, the following deed, and in theſe words: "WHEREAS I have here-"tofore, by ſeveral letters, promiſed a certain gentleman three thou-"ſand pounds with my daughter *Hannah*, and my eſtate at my death, "if he will take the name of *Boughton* upon him; BUT WHEREAS "he has affronted me, and leſt he ſhould take advantage of them "after my death, I do hereby charge all my eſtate with four thou-"ſand pounds a-piece for all my children, with a hundred pounds "to my ſiſter *Cook*, and five hundred pounds a-piece to her two "ſons: and I do hereby bind myſelf, my heirs, &c. in the ſum of "twenty-five thouſand pounds to my children, their executors, "&c. if all my eſtate, at my death, ſhall not be equally divided "among them, except the money given to my ſiſter *Cook* and her "two ſons."

Edward afterwards, by will, diſpoſes of his eſtate in a very contrary manner to the laſt deed.

The bill was brought againſt the deviſees and truſtees of the will.

THE QUESTION was, Whether the will could have any effect to revoke the deed? and the caſe of *Clavering v. Clavering* (*a*) was cited for the plaintiffs, and the caſe of *Naldred v. Gilham* (*b*) for the defendants.

HARDWICKE, *Lord Chancellor*, ſaid, that as this was a deed formerly executed in the life-time of *Edward Boughton*, and a volun-

(*a*) 2. Vern. 473. S. C. Prec. Chan. 235. S. C. 1. Brown. P. C. 122.

(*b*) 1. Peer. Wms. 578.

tary

tary ſettlement without a power of revocation, it will not be ſubject to a revocation by the will; for if it was, there would be no difference between a deed with a power of revocation, and one without that. The caſe of *Naldred v. Gilham* was, where an old woman executed a voluntary ſettlement of her eſtate, which ſhe always kept by her, in favour of her nephew; a copy of this was ſurreptitiouſly got by the nephew's father; the old woman changed her mind, and made a different diſpoſition by will; and after her death, a bill was brought to ſet up the copy againſt the will; and THE MASTER OF THE ROLLS decreed the copy to be good, becauſe the original was loſt; but upon an appeal to MACCLESFIELD, *Lord Chancellor*, the decree was reverſed; for as it was only a voluntary ſettlement, and kept always by the party, it muſt be preſumed ſhe intended to have a power over it; and he refuſed to ſhew any kindneſs to a copy gained ſo fraudulently, or to a voluntary ſettlement under ſuch circumſtances: that in this caſe the deed was not deſtroyed; and that as it was for the proviſion of children, it was a kind of a conſideration; and that it ſhould take place of all other voluntary ſettlements; and therefore of the will, which was voluntary, but not of debts or other ſettlements for valuable conſiderations.

BOUGHTON *againſt* BOUGHTON.

The defendant's Counſel urged, that the two thouſand pounds a-piece ſecured to the daughters by the ſettlement was to be included, and make up a part of the four thouſand pounds; and therefore what was not given to the daughters by the deed was well deviſed by the will.

Cheeſeman *againſt* Partdrige.

Lincoln's-Inn-Hall, December 6, 1739.

Caſe 81.

UPON EXCEPTIONS to a decree by commiſſioners upon charitable uſes—THE CASE was: *Thomas Cheeſeman*, by will, after giving ſeveral pecuniary legacies, goes on: "ITEM, I give "to the charity-ſchool of *Yovell* the ſum of fifty pounds; ITEM, "I give to the *Latin* ſchool, if any man is poſſeſſed of it, and "teaches boys, and is truly grounded in the *Latin* tongue, five "pounds a-year, for teaching and inſtructing three poor boys; "ITEM, I give to the poor of the pariſh of *Yovell* fifty pounds "a-year, to be paid at *Eaſter* out of my eſtate at *Omer* by my exe-"cutor;" and gives his eſtate at *Omer* to his wife, the executrix, and her heirs, and made her ſole executrix; and his will was, that his wife ſhould enjoy all his other lands not before deviſed in his will for her life, upon paying his legacies.

A. after giving legacies, goes on: "*Item*, I "give to the "charity-ſchool of *Y.* "50l.; *item*, I "give to the "*Latin* ſchool "of *S.* 5l. a-"year; *item*, I "give to the "poor of *Y.* "50l. a-year, "to be paid "out of my e-"ſtate at *O.* "*mer* by my "executor," and gives the eſtate at *Omer* to his executor in fee; this is a perpetual annuity of 5l. to the *Latin* ſchool, and alſo charged upon the eſtate at *Omer*, in whoſeſoever hands it comes.—S. C. 1. Atk. 436.

The inquiſition found, that the teſtator made his wife executrix, and that ſhe had poſſeſſed herſelf of the real and perſonal eſtate; and that *Partdrige* the reſpondent had been ſchoolmaſter of the *Latin* ſchool for two years, whereby ten pounds became due to him by the will.

Whereupon the commiſſioners made their decree in theſe words, "That *Sarah Cheeſeman*, the exceptant, do and ſhall, within one

CREESEMAN *against* PARTRIDGE.

"month, pay, or cauſe to be paid, to *Partdrige*, the reſpondent, "the ſum of ten pounds due to him at *Lady-Day* laſt; and that "the owner of the eſtate at *Omer* do and ſhall, for ever hereafter, "pay to the ſchoolmaſter of *Yovell Latin* ſchool the ſum of five "pounds half-yearly."

Two exceptions were taken to this decree.

THE FIRST was, that the meſſuage called *Omer* was not chargeable by the will to pay five pounds a-year to the *Latin* ſchool of *Yovell*.

THE SECOND EXCEPTION was, that if the ſame was ſo charged, it was but for the executrix's life, and not for ever, nor to pay in the manner and proportion the decree directed, half-yearly.

HARDWICKE, *Lord Chancellor*, over-ruled the firſt, and declared it was charged; that the teſtator ſeemed to have two general intentions, the one to give ſums in groſs, and the other annuities; that it was apparent, from the will beginning with money-legacies, and then ranging the annuities by themſelves, that the eſtate at *Omer* is directly charged with the fifty pounds a-year to be paid the poor, and directed that clauſe to be carried back to the clauſe of the five pounds annuity, ſo as to make but one, and to be both charged on the eſtate at *Omer*, becauſe they are both bequeſts of the very ſame nature; and to warrant his joining the two clauſes, he cited 1. *Salk.* 234. that "ITEM" in this caſe was no more than "*and alſo*," in that the five pounds was not payable out of the perſonal eſtate, as was urged; for there is no proviſion in the will to raiſe a perpetual fund out of it to furniſh an annuity commenſurate to the deviſe, which is for ever; and that without ſuch proviſion, a perſonal eſtate muſt be allowed to be of too periſhing and tranſitory a nature to ſupply an annuity for ever.

That it was not charged on the lands the wife had for life, as was argued, for the precedent reaſon, that an eſtate for life cannot ſupply a perpetual payment of the annuity; and this annuity muſt be charged on the eſtate at *Omer*, as it cannot be ſupplied by any other eſtate in the will; and that paying legacies out of the wife's eſtate for life means only ſums in groſs, and not annuities.

2. Vent. 349.

LORD HARDWICKE, to the ſecond exception, ſaid, as to the continuance of the annuity, that it was the intention of the teſtator to have it perpetual; for it is not given to the ſchoolmaſters, or any other perſon, but to the ſchool, and therefore deſigned it to laſt as long as the ſchool itſelf; and that a gift to a pariſh-church will be a good gift for ever to the parſons of that church; that the gift is for inſtructing three poor boys, and if the teſtator had only three particular boys in view he would have named them, and ſo have limited the duration of the annuity, or how long it ſhould continue; that the teſtator ſaying "to be paid by my executrix," does not deſtroy the perpetuity; for the exceptant is not charged in the will

as

as executrix in reſpect of the office, but is only deſcribed by that word as owner of the eſtate at *Omer*, which was deviſed to her and her heirs (*a*). CRESSEMAN *againſt* PARTRIDGE.

Thus far he over-ruled the ſecond exception; but ſaid, the commiſſioners exceeded their power, and were not warranted to make the annuity payable half-yearly; and ordered the decree to be altered to one yearly payment every *Eaſter*, as the payment of the fifty pounds a-year to the poor is, and the decree to ſtand good upon that alteration,

(*a*) See Edgel v. Haywood, 3. Atk. 352. 357.

Graydon *againſt* Hickes. Caſe 82.

Lincoln's-Inn-Hall, December 6, 1739.

JOHN GRAYDON, by will, deviſes in theſe words: "I GIVE "to my only daughter, *Mary Graydon*, the ſum of one thou- "ſand pounds, to be paid her at the age of twenty-one years, or "day of marriage, which ſhall firſt happen, provided ſhe marry "with the conſent of my executors; but in caſe ſhe die before "the money become payable on the condition aforeſaid, then I "give the ſame one thouſand pounds equally between my younger "ſons *Benjamin* and *Gregory Graydon*, the plaintiffs;" and makes three executors.

A. by will gives to his daughter 1000l. to be paid at twenty-one, or marriage, provided ſhe marry with conſent of executors; if any of the executors die, condition void.

All the executors died before the marriage of the ſaid *Mary Graydon*, one of the defendants by the name of *Mary Hickes*; and the defendant's mother, who was ſurviving executrix, made her will, in the beginning of which ſhe gave the defendant, *Mary Hickes*, all her dreſſing-plate, gold watch, with ſeveral other ſpecific legacies; and in the middle of her will ſhe ſays, "ITEM, "my will is, in caſe my daughter *Mary* ſhall marry before ſhe "attain the age of twenty-one years, without the conſent of my "executor firſt had and obtained under his hand and ſeal, if he be "living, that then ſhe ſhall not be intitled to any part of the lega- "cies which I have hereby given her, but that her whole ſhare "ſhall be equally divided between my ſons *Benjamin* and *Gregory* "*Graydon*;" and in the latter part of the will deviſes the reſidue of her perſonal eſtate to the ſaid *Benjamin* and *Mary* equally, and makes her eldeſt ſon, *John Graydon*, executor. S. C. 2. Atk. 16.

The ſon renounced the executorſhip; and *Mr. Timewell*, one of the defendants, took out adminiſtration to *Mary Graydon*, the mother, and adminiſtration to *John Graydon*, the father, *de bonis non*. The defendant *Mary*, the daughter, married before twenty-one, without conſent of *John Graydon*, the executor named by the mother's will.

The bill was brought for an account, and to have the one thouſand pounds legacy given the defendant by her father, and the ſpe-

GRAYDON against HICKES.

cific legacies and ſhare of the *reſiduum* given by the mother, as deviſees over, if the defendant *Mary* married without conſent before twenty-one, which ſhe did with the defendant *Hickes*.

LORD HARDWICKE decreed that the one thouſand pounds in the father's will was not forfeited, the executors being dead before the marriage of the defendant *Mary* before twenty-one. The condition to marry "with the conſent of my executors" (jointly), the executors being all or any of them dead, would become impoſſible; and the condition is ſubſequent, being annexed to the time of payment, and not to the legacy itſelf; and when conditions ſubſequent become impoſſible by the act of God, the performance of the condition is excuſed, and the eſtate abſolute (*a*). *Co. Lit.* 206. To this purpoſe are the two following caſes, not long ago decreed. In the caſe of *Peyton v. Bury* (*b*), *upon an Appeal from the Rolls*, JAMES PEYTON gave by will the ſum of one thouſand pounds to his mother for life, and after her death deviſed the ſame to his niece, PROVIDED ſhe married with the conſent of two perſons named in the will, with a deviſe of the one thouſand pounds over to one of the perſons named to give conſent, and died; and the niece, the legatee, married without the conſent of the ſurvivor; and upon a bill brought by the niece and her huſband for the legacy, THE MASTER OF THE ROLLS decreed for them; for it being a perſonal truſt, and to be performed by both perſons jointly, and not by one ſingly, the condition was impoſſible by death, which is an unavoidable act of Providence, and the legacy abſolute. In the caſe of *Fountain v. Hart* (*c*), a perſon gave a legacy to *A.*; and in caſe ſhe married without the conſent of his executors, he deviſed it over; one of the executors died; and though *A.* married without applying to the executor who ſurvived for his conſent, the legacy was decreed to *A.* and her huſband, becauſe it was now impoſſible to marry with the conſent of both executors, one being dead, and the reſtriction become impoſſible to be complied with (*d*).

But if a legacy be given to *A.* with condition, that if ſhe ſhall marry before twenty one, without the conſent of the executor, then to *B.* &c. *C.* the executor renouncing, yet this conſent neceſſary to ſave the condition.

The queſtion upon the mother's will was, Whether the ſpecific legacies were forfeited, as alſo the defendant *Mary*'s ſhare of the *reſiduum*?

BROWN, *for the defendant*, argued, that ſuch condition was become impoſſible, and could not be performed according to the

(*a*) See Harvey *v.* Aſton, 1. Atk. 375. S. C. Comy. Rep. 726. S. C. Caſes T. T. 212.

(*b*) Peyton *v.* Bury, 2. Peer. Wms. 626.—See alſo Jones *v.* Suffolk, 1. Bro. C. C. 529.

(*c*)

(*d*) See upon the ſubject of this caſe, Porter *v.* Fry, 1. Chan. Caſes, 138. Aſton *v.* Aſton, 2. Vern. 452. Gilles *v.* Wray, 1. Peer. Wms. 284. Semphil *v.* Bayley, Prec. Chan. 562. Pullen *v.* Ready, 1. Wilſ. 21. Underwood *v.* Morris, 2. Atk. 184. Daly *v.* Deſbouverie, 2. Atk. 265. Elton *v.* Elton, 1. Wilſ. 159. Rheniſh *v.* Martin, 3. Atk. 330. Wheeler *v.* Bingham, 3. Atk. 364. S. C. 1. Wilſ. 135. Long *v.* Dennis, 4. Burr. 2052. Hemmings *v.* Munckley, 1. Bro. C. C. 303. Scott *v.* Tyler, 2. Brown. C. C. 431.

letter

letter of the will; for by the ſon's renouncing the executorſhip, there was then no executor to have the conſent of, and therefore the legacy unforfeited.

THE CHANCELLOR ſaid, this objection was not well grounded, for the condition is not annexed to the office of executor; but the ſaid executor is a deſcription of the perſon only, and land is often given to a man by the name of executor; that this is a perſonal power given to him, not as executor, for it is ſaid, "if he ſhall be "living," and does not require his taking the office of executor upon him; and as there is a deviſe over, not only the ſpecific legacies, but alſo *Mary*'s ſhare of the *reſiduum* is forfeited; for the condition affects them both, the clauſe being general, and not limited to either in particular, and as far from one as the other, for it is in the middle; that though the teſtatrix could not ſpeak all her words at once, yet the whole will ſhall be underſtood to be ſpoke at the ſame time, and to be but one entire thing, and the condition to extend to every part of it, as it is not tied to either the ſpecific legacies or *reſiduum* in particular; and the *reſiduum* is as much a legacy as the gold watch, &c.

Seys *againſt* Price.

Caſe 83.

Lincoln's-Inn-Hall, July 24, 1740.

RICHARD SEYS deviſes his lands to truſtees, in truſt for payment of debts and legacies; and after payment of them, in truſt for *Evan Seys* his couſin, and the heirs male of his body, with remainder over, in truſt for *Charles Seys* in fee; and bequeathed to the plaintiff *Elizabeth Seys*, his daughter, a legacy of three thouſand pounds, to be paid at twenty-one; and in the ſame will declared, that he had executed a bond to *Elizabeth* for two hundred pounds, and willed it to be paid her by his truſtees out of his eſtate, among his other bond debts. *Evan Seys* entered upon the teſtator's death, and ſuffered a recovery of all the eſtate, except one hundred pounds a-year; and afterwards, upon a treaty of marriage with *Elizabeth* the legatee, then an infant, enters into articles, whereby, in conſideration of the intended marriage, and of her portion being the legacy of three thouſand pounds and bond of two hundred pounds, both chargeable on *Evan*'s eſtate, under the deviſe, he agrees and covenants with truſtees to ſettle upon her for life as a jointure, and in bar of dower, one third part of the deviſed eſtate, being about three hundred pounds a-year. *Evan* and *Elizabeth* intermarry, and he dies without iſſue, having firſt made his will, and therein deviſed to his wife *Elizabeth* for her

A. deviſes his lands to truſtees for payment of debts and legacies, and after to *B.* in tail male; *B.* ſuffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and alſo of a bond for 200l. charged on the ſaid eſtate; on which *B.* covenants with truſtees, by articles, that in conſideration of intended marriage, and of the portion of 3000l. and bond of 200l. to ſettle a jointure upon *C.* of one-third of the deviſed eſtate, which was about 300l. *per annum*, in bar of dower.

The marriage took effect, and the wife ſurvived, yet her *choſes in action* being the conſideration of the ſettlement, ſhall not ſurvive in equity. And this a good ſettlement, according to 27. *Hen.* 8. cap. 10. to bar the wife of her dower. But if, in conſideration of the wife's fortune, which conſiſted of *choſes in action*, a huſband ſettles an eſtate inadequate to ſuch fortune and the degree of the wife, a court of equity will not take away that right which the law gives the wife to *choſes in action*.—S. C. Bar. Rep. Chan. 217. 2. Vern. 68. 507. 683. and poſt. 137, 138, &c. La Noy *v.* the Ducheſs of Athol, Adams *v.* Cole, Hilary Term, 9. *Geo.* 2. in Foreſter's Reports.

life,

SEYS *against* PRICE.

life, not only the one-third of the eſtate which he had before his marriage ſtipulated to ſettle upon her, but alſo the two remaining thirds; and alſo made her his ſole executrix. *Elizabeth* has brought her bill to have the legacy and bond raiſed out of the whole eſtate deviſed to *Evan* for her benefit; and the equity ſhe ſuggeſts is, that as ſhe was an infant at the time of the marriage-articles entered into, ſhe was not bound by them, and therefore relinquiſhes and waives all benefit from them, and claims entirely under the will; and that the legacy and bond being *choſes in action*, and never releaſed to her huſband, or extinguiſhed by him, ſtill remain ſubſiſting and continuing charges on the eſtate, and either veſt in her by ſurvivorſhip at common law, or muſt be raiſed for her in equity as executrix.

HARDWICKE, *Lord Chancellor*. The general queſtion is, Whether this legacy and bond, being *choſes in action*, and never actually releaſed to *Evan Seys*, are not ſubſiſting charges on his eſtate? or, Whether, under the circumſtances of this caſe, they are not extinguiſhed and ſunk into the inheritance?

This may be conſidered in two lights: the one, whether *Elizabeth*, the plaintiff, is entitled in equity to theſe *choſes in action* in her own right, by ſurviving *Evan* her huſband, who never got them releaſed; the other, whether ſhe is intitled to them *in autre droit*, as executrix to *Evan*.

As to THE FIRST, I will ſuppoſe, that the legacy and bond are ſubſiſting charges on *Evan*'s eſtate; and viewing things in this light I am of opinion, that *Elizabeth* is not intitled in equity to theſe *choſes in action* by ſurvivorſhip; and my reaſon for it is this: if a man, in conſideration of an intended marriage with an infant, and of the infant's portion, make a ſettlement by way of jointure in bar of dower, which is good within the 27. *Hen.* 8. c. 10. and after a marriage is had, eſpecially taking it that the wife is of the age of conſent, and then the huſband dies, this jointure in law will clearly bar her of her dower, and cannot be relinquiſhed by her, *Co. Lit.* 37. b.; for otherwiſe it would be very miſchievous, and would make jointures on infants very precarious and uncertain, eſpecially in noble families, where the young ladies are often married in their minority. Suppoſe a jointure were ſettled on a lady, not only in conſideration of marriage, but alſo of her portion, which conſiſted of *choſes in action*, and the huſband die without altering their nature or reducing them to poſſeſſion, the wife undoubtedly at law will be entitled to them; yet I am of opinion, as ſhe would be bound by the jointure before marriage, ſo the repreſentatives of the huſband would be conſidered in this court as purchaſors of her portion by virtue of that jointure; and though the legal intereſt of ſuch *choſes in action* veſts in her by ſurvivor, and ſhe may have the action at law for the recovery of them, yet a bill by the huſband's repreſentatives may be brought to have the benefit of the ſecurities, and for the wife to ſtand as a truſtee for them, both which this Court will

decree

decree for them, and will not let the wife have thoſe things which were purchaſed from her by her jointure; I mean, if it appear that the jointure is adequate to her degree and fortune, and made without fraud; for if it was made by colluſion in the huſband, who ſettles on her ſome inconſiderable jointure on purpoſe to bar her of her dower, which would be a more ample proviſion; in that caſe, if the wife ſhould be entitled to the legal benefit of *choſes in action*, this Court would not, under ſuch circumſtances of hardſhip and coſinage, take from her that proviſion which the law had given her; and this matter of fraud would be a rebutting equity in the wife, which ſhe might ſet up againſt the equity ſuggeſted by the repreſentatives of the huſband. But it is objected in the preſent caſe, that there is no jointure that is effectual at law within the 27. *Hen.* 8. there being only an agreement by articles to make a jointure, which is not made; but ſuch an executory jointure in equity will not be different from the caſe of an actual jointure at law; for articles entered into for a valuable conſideration to do a thing which is not actually done, yet it ſhall be conſidered in this court as done; for they are favourites of a court of equity, which will eſteem the preſent articles as a proviſion for the wife, will allow her the benefit of them, and deem her as much the owner of the eſtate in equity as if a legal ſettlement had been made purſuant to ſuch articles; and the huſband too is conſidered as much a purchaſer of the wife's portion under this executory agreement as if it had been carried into execution; and this is within the caſe of *Blois v. Lady Hereford (a)*, where, though no mention was made of the wife's perſonal eſtate, as part of the conſideration of the ſettlement, yet when, after the death of the huſband, there appeared to be a *choſe in action* which would belong to the wife at law, the Court would not let her have it by ſurviving her huſband, but decreed it to his executors, and ſaid, ſhe ought not to have her jointure and fortune both; if ſo, *à fortiori* in the preſent caſe, where the *choſes in action* appear in the articles to be the expreſs conſideration of them, and the huſband intended to be a purchaſor of them, they being her portion. It is farther urged for the plaintiff *Elizabeth*, that the huſband having deviſed the whole eſtate to her for life, therefore ſhe has no occaſion and will not claim by the articles, but waives them, and makes her title to the whole by her huſband's bounty under the will. But I apprehend the will makes no difference; for ſhe can claim only two-thirds under that, for one-third ſhe has a right to under the articles, as to which the huſband was eſteemed a truſtee for her; and it is impoſſible he ſhould deviſe that which he had parted with before, and had not at the time of the deviſe; and they having only one-third under the articles, concludes her from the benefit of her portion; for ſhe ſhall not have both her portion, and the jointure which was given her in lieu of her portion.

Sect. against Page.

An agreement by articles to make a jointure is equal to a jointure according to 27. *Hen.* 8. c. 10. in a court of equity.

(*a*) 2. Vern. 507. Eq. Ca. Abr. 68.

I ſhall

SEYS *againſt* PRICE.

I ſhall view this in one other light. And ſuppoſe (without diſtinguiſhing one-third under the articles, and the two other thirds under the will) it be conſidered, that this deviſe of the whole eſtate for life is a ſatisfaction for what *Elizabeth* may claim under the articles, an ample ſatisfaction it is, for it is a ſatisfaction, and a great deal more. In this court, where a man agrees to ſettle an eſtate upon a wife, or iſſue of the marriage, and ſuffers the eſtate ſtipulated to deſcend to the iſſue, or deviſes it to the wife, Can either party, in ſuch caſe, claim under the articles, when what is given or ſuffered to deſcend is a ſatisfaction? It is certain they cannot; for what is done in ſatisfaction of a thing, and is an equivalent to it, is taken in the ſame light as if the thing itſelf had been done; and therefore, if the deviſe in the preſent caſe be a ſatisfaction, it is the ſame in the eye of equity as the jointure itſelf; and ſo in this view ſhe cannot claim both her fortune, and her jointure which was given in lieu of it.

Where a man agrees to ſettle an eſtate upon a wife or iſſue, and after ſuffers the eſtate to deſcend to the iſſue, or deviſes it to the wife; neither the wife or iſſue can, in ſuch caſe, claim under the articles, for this equivalent is a bar.

2. Vern. 558. Eq. Abr. 26. pl. 5.

What I have hitherto ſaid, has been in reſpect to the demand made by the wife in her own right as ſurvivor. I will now go to the other queſtion, which is, If ſhe is not entitled in her own right, whether ſhe ſhall not have the legacy and bond *in autre droit*, as executrix to *Evan*?

A *choſe in action* of the wife's before marriage, and charged upon the huſband's eſtate, ſhall not, after the death of the huſband, ſurvive, but ſhall be conſidered as merged.

And upon this point I ſhall not admit or ſuppoſe that the legacy and bond, under the circumſtances of this caſe, are ſubſiſting or continuing charges on *Evan*'s eſtate in fee-ſimple, though his eſtate that was not comprized in the recovery will bear another conſtruction; and I do not know any caſe, that where a perſon at full age, being abſolute owner of an eſtate in fee, and alſo of a charge upon ſuch eſtate, that the charge has been kept in him diſtinct from the eſtate, and after his death levied and raiſed out of it for an executor to the prejudice of an heir; for in the caſes of *heræs factus* and executor, which often happen, the general rule of the Court has gone in favour of the heir, for the benefit of the real eſtate, to prevent charges being brought upon it. Beſides, this portion could not be raiſed in the huſband's life-time by his wife, for he was both debtor and creditor, as being owner both of the eſtate and charge upon it; and the charge in his life-time is united to it and merged in it, and ſhall not, after his death, be ſevered from it. The caſe of *Thomas* v. *Kemiſh* (*a*) goes upon another reaſoning: That was the caſe of an infant, who, everybody knows, has not an abſolute power or ownerſhip in his real eſtate until twenty-one, as he has over his perſonal eſtate in his infancy, which may be deviſed to pay debts, or may be diſtributed in legacies, by an infant; and if a young lady, who is a minor, has a perſonal eſtate, it may be a means to prefer her in marriage at a time when ſhe is not capable of making a ſettlement of her lands; and the diſtinction has always been between an infant who had not an abſolute command over his real eſtate, and one of full age who had;

(*a*) 1. Eq. Abr. 269. S. C. 2. Freem. 207. S. C. 2. Vern. 348 457.

and

and that where an infant is entitled to a perſonal eſtate, and alſo to a real one which is incumbered with debts and mortgages, the Court will direct the perſonalty to go in diſcharge of the incumbrances; yet it will not order the mortgages to be aſſigned to attend the inheritances, but ſtill to be conſidered diſtinctly as perſonal eſtate for the benefit of the infant. But whatever I have ſaid in relation to *Evan*'s eſtate in fee-ſimple will fail me in the fee-tail eſtate of one hundred pounds a-year that was not compriſed in the recovery, and wherein he had no abſolute dominion or ownerſhip; for as to theſe fee-tail lands and proportionable ſhare of the three thouſand pounds and two hundred pounds muſt be ſubſiſting charges on them, and muſt be raiſed out of them in the hands of the remainder-man *Charles Seys*, for the benefit of *Evan*'s executrix and his perſonal eſtate; for it cannot be preſumed, that *Evan* intended it to ſink for the benefit of a remainder-man who is a ſtranger to him, and makes no title under him, but claims *per formam doni* of *Richard Seys*, the firſt deviſor.

SEYS *againſt* PRICE.

Where an infant is entitled to a perſonal eſtate, and to a real one which is incumbered, equity will direct the perſonal to go in diſcharge of incumbrances, but will not order mortgages to be aſſigned to attend inheritances, but ſtill to remain as perſonalty.

DECREE *in part*. That *Evan* be conſidered as a purchaſor of the portion of three thouſand pounds and bond of two hundred pounds, by virtue of the marriage-articles; and that having ſuffered a common recovery before his marriage of the greateſt part of the deviſed eſtate in tail, no more of the ſaid three thouſand pounds or two hundred pounds be raiſed than is proportionable to the value of ſuch part of the eſtate as the ſaid recovery did not extend to.

Sorreſby *againſt* Hollins.

Caſe 84.

(BY CONSENT.)

Lincoln's-Inn Hall, Auguſt 6, 1740.

CASE. *John Naylor*, in 1738, after the ſtatute of Mortmain, made his will in theſe words: "I will and deſire that my exe- "cutors, within twelve months after my deceaſe, do ſettle and "ſecure, by purchaſe of lands of inheritance, or *otherwiſe as they* "*ſhall be adviſed*, out of my perſonal eſtate, one annuity or yearly "payment of fifty pounds, to be paid yearly and diſtributed for "ever, by my executors, their heirs and aſſigns, among the poor "and indigent people of *Leeke*, in the county of *Stafford*, in ſuch "manner as they ſhall think fit; and my will alſo is, that my exe- "cutors do alſo ſettle and ſecure one other annuity of five pounds, "to be paid yearly to the vicar of *Leeke* for the time being, for "ever, for preaching an annual ſermon on every twelfth day of "*October*;" and the teſtator deviſed the reſidue of his perſonal eſtate to be equally divided between his ſiſters *Mrs. Sorreſby* and *Mrs. Hollins*.

A. by will deſires his executors, within twelve months after his deceaſe, to ſettle and ſecure, by purchaſe of lands of inheritance, *or otherwiſe as they ſhall be adviſed*, an annuity of 5ol. to be diſtributed for ever by his executors, their heirs and aſſigns, among the poor of *Leeke*. This is a good charity, notwithſtanding the ſtatute of Mortmain, by reaſon of the words, *or otherwiſe*.

HARDWICKE, *Lord Chancellor*. The only queſtion in this caſe is, Whether the deviſe of the two annuities of fifty pounds and five pounds to charitable uſes is void by the late ſtatute of Mortmain?

It

SORRELL *against* HOLLINS.

It is inſiſted upon by the plaintiffs, the reſiduary legatees, that it is void, becauſe the direction of the deviſe is to ſettle and ſecure the annuity of fifty pounds by a truſt of lands of inheritance; and that though the words "or otherwiſe" are added, they will not vary the caſe, for *Mr. Naylor's* intention was, to aſſure the annuity out of lands of inheritance. But I am of opinion upon this act of parliament, that this bequeſt is not void, and that there is no authority to conſtrue it to be void, if by law it can poſſibly be made good. The act of parliament is not at all aimed againſt perpetual charities merely as ſuch, or to prevent the eſtabliſhment or creation of them, but is deſigned againſt the caſes of perpetual charities in lands, and, as the title imports, to reſtrain the diſpoſition of lands whereby the ſame become unalienable. The whole recital and enacting part of the ſtatute take notice only of the unalienable diſpoſal of land, whereby heirs are diſinherited; and therefore the alienation or conveyance of lands to ſuch purpoſes are prohibited; and though there is a clauſe to prohibit money being laid out in lands to ſuch purpoſes as would make them unalienable, yet there is no reſtriction whatſoever upon any one from leaving a ſum of money by will, or any other perſonal eſtate, to charitable uſes, provided it be to be continued as a perſonalty; and the executors or truſtees are not obliged or under a neceſſity of laying it out in land, by virtue of any direction of the teſtator for that purpoſe. Conſider then, whether this clauſe and deviſe in the will fall within the reſtraint and prohibition of the ſtatute. And in the firſt words they do fall within them, for the teſtator directs, that his executors "ſhall ſettle and "aſſure, by purchaſe of lands of inheritance, &c.;" and if the teſtator had reſted upon ſuch firſt words, his deviſe would have been clearly void: but then he goes on in the disjunctive, "or otherwiſe, as my "executors ſhall be adviſed;" and if a deviſe in a will is in the diſjunctive, and leaves to the executors two methods to do a particular thing by, the one lawful and the other prohibited by law, Can any Court ſay, becauſe one method is unlawful, that therefore the other is ſo, and the whole bequeſt void? No; for if one bequeſt is lawful, that ſhall be purſued and take effect. It has been further argued againſt the deviſe, that the words "for ever" ſhew the annuities muſt ariſe out of ſome real eſtate, which is only capable of ſupplying them for ever, for perſonal funds are too periſhable and tranſitory in their nature to anſwer ſuch everlaſting annuities: and ſuppoſe a particular ſum were veſted in ſtock, with deſign to purchaſe a particular yearly ſum or annuity, it may ſo happen that the Company may be quite diſſolved, or that ſtock may fall, or intereſt be ſo reduced that half the annuity may not be produced. But theſe objections may be over-ruled; for if the Company ſhould be diſſolved, the principal ſtock may be taken out and veſted in ſome other Company. And there may be annuities that may probably continue for ever, and yet not payable out of land; and I will mention an inſtance of one which has laſted a century and a half, and may exiſt perpetually; which is *Sir Thomas White's* charity, being a diſpoſition of money to be employed by continual rotation in loans to poor tradeſmen

Sir Thomas White's Charity.

tradeſmen of ſeveral ſums to be let out for a ſtated number of years, and then to be repaid; and any man may at this day give by will a perpetual charity in this manner. But if a man by will ſecures ſuch loans by lands, or purchaſe of lands, his deviſe will be void, and contrary to the late ſtatute of Mortmain. If this caſe had been to be conſidered by the Court before the act, it would, as the ſafeſt method to ſecure the charity for ever, have recommended and directed a purchaſe of lands; but when this Court is precluded from doing it in this manner, if it can be obtained in any other, there is no reaſon to ſay the deviſe is void. It is ſaid too, that the words "heirs and aſſigns" import a purchaſe in land or ſome real thing, for no perſonal thing can deſcend to heirs; and if the money is to be reveſted in a perſonal ſecurity, it will not go to the heirs, but to the executors; and ſo the intention of the teſtator not purſued.

If *A.* by bond bind himſelf, his heirs, executors, and adminiſtrators, to a papiſt, who obtains judgment, and takes out an *elegit*, ſuch papiſt cannot maintain ejectment, yet the bond binds the repreſentatives of the obligor.

I will ſuppoſe that an obligor binds himſelf, his heirs, executors, and adminiſtrators, in a ſum of money to a papiſt, who obtains judgment upon the bond, and takes out an *elegit*. In this caſe, I think, it has been held at the aſſizes, or at leaſt it might very well have been ſo held, that the papiſt cannot maintain an ejectment, and yet the bond is good to bind the perſon of the obligor and his perſonal repreſentatives, but not to charge his lands, or his heirs who repreſent him in his landed capacity. And this comes up to the preſent caſe, which may ſecure the charity in a double ſenſe, either upon land or perſonalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other: and I am of opinion upon the whole, that there is nothing that makes this bequeſt void in every part, but that it is good in that way which the law does not forbid. But I would not have it queſtioned, that if a man ſhould by his will direct a ſum of money to be laid out in land, or upon rent-charge to be ſecured upon land, for any charity, and in the mean time, till it can be ſo laid out, to be inveſted in Government ſecurities, for the benefit of the charity, but that that bequeſt will be void, becauſe the final end and intention of ſuch teſtator was to diſpoſe of his money in land; and the inveſtiture of it in Government and perſonal ſecurities was but to ſecure it until a proper purchaſe of land or rent-charge offered.

As to the annuity of five pounds, there are fewer objections to that than the other; for there is no direction at all for any money or perſonal eſtate to be laid out in land, for the executors are only willed to "ſecure and ſettle five pounds a-year, &c.;" and it muſt be ſecured upon a perſonal fund, conſiſtent with the will and intention of the teſtator, and not contradictory to the words of the act of parliament. It is often ſaid in the old Books by the Judges, "I was by "at the making the act of parliament, and the meaning and intention of it was then ſaid to be ſo and ſo;" and I was by at the making of this ſtatute, and it was ſaid at that very time by the Legiſlators, that it would not hinder any charitable diſtribution of a perſonal eſtate. Therefore I decree the deviſe good, and the money to be inveſted

It was ſaid at the making the ſtatute of Mortmain, that it would not hinder any charitable diſtribution of perſonal eſtate.

SORRELL *against* HOLLIS. invested in *South-Sea* stock, for the charitable purposes mentioned in the will.

In favour of the deviſe was cited *Porter's Caſe*, 1. *Co.* 16. *Contra*, *Roper v. Radcliffe*, in the houſe of lords, and *Adlington v. Lam*, before LORD HARDWICKE.

Caſe 85. The Attorney General *againſt* Lord Gower.

Lincoln's-Inn-Hall, Auguſt 6, 1740.

The corporation of *N.* in 1684, leaſes to truſtees for one thouſand years, to make improvements, in truſt to permit the corporation, &c. to diſpoſe of rents and profits to the uſe of miniſter and relief of poor inhabitants, and to no other uſes whatſoever. The corporation continue in poſſeſſion, and make orders until 1735, and leſſees do not intermeddle therewith: and in 1735 the executor of ſurviving truſtees aſſigns this leaſe; and the Lord Chancellor refuſed to eſtabliſh this term, but eſtabliſhed the charity, which had continued and been complied with from the making of the leaſe; for ſuch long uſage, he ſaid, was an evidence that there was the like claim before leaſe made, as there was no evidence to the contrary. S. C. Bar. C. R. 145. 152.

LORD CHANCELLOR HARDWICKE's opinion upon conſideration of this cauſe, which was argued laſt *Trinity Term*.

This is an information brought in the name of the attorney-general, at the relation of ſeveral of the tenants of ſome part of the charity-eſtate in queſtion, and at the relation alſo of the inhabitants of the borough and town of *Newcaſtle-under-Lyne*, in the county of *Stafford*; and there are no other relators; but *Mr. Crew Offley* and others are complainants with the attorney-general, who are aſſignees of a term of one thouſand years by aſſignment in 1735; and this information is for ſeveral purpoſes.

FIRST, To eſtabliſh a leaſe made by the corporation of *Newcaſtle*, on the thirteenth of *October* 1684, of all their lands and real eſtate, by very comprehenſive words, to *Sir Thomas Billet*, *Juſtice Turton*, and four others, for one thouſand years, upon certain truſts.

SECONDLY, To have the benefit of that term, and of the aſſignment of it made in *May* 1735, by the executor of *Mr. Juſtice Turton*, the ſurviving truſtee, in ſuch leaſe, to the plaintiff, *Mr. Crew Offley* and others, co-plaintiffs with the attorney-general.

THIRDLY, To eſtabliſh certain charities concerning which it is charged in the information that the eſtates now in queſtion, and the term compriſed in the leaſe, are ſubject; and for an account of the profits of the eſtate; and to ſet aſide ſome abſolute conveyances made by the corporation of part of the charity-eſtate included in the truſt-term; and alſo to ſet aſide two leaſes, one to *Lord Gower* of ſeveral houſes and cottages, and the other to the defendant *Mr. Bourne*; and that the new truſtees may be quieted in the poſſeſſion of ſuch part of the premiſes for which ſome of the tenants have attorned, and to compel the other tenants of the reſidue to attorn to them; and that they may be put in poſſeſſion of that part of the eſtate.

One of the principal points in diſpute ariſes upon the leaſe of 1684 and the aſſignment in 1735; and to determine how far this Court can interpoſe in eſtabliſhing the term, as it is granted to the aſſignees, it will be neceſſary to conſider the circumſtances under which this caſe was made. It is well known, that in the year 1684 there were arbitrary and illegal practices all over the kingdom

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to procure the ſurrenders of the charters of corporations, which extended to the borough of *Newcaſtle*; and it appears, that an information had been brought againſt it to evict its charter, and that the corporation was dealt with to ſurrender it to the crown. Upon which occaſion, on the fifteenth of *October* 1684, which is the date of this leaſe, it appears in the corporation books, that there was an order then made, by which it was agreed, at a corporate aſſembly, that the charter, and all the lands, &c. which the members enjoyed in right of the borough, ſhould be ſurrendered into the hands of the king; and that *Sir Thomas Billet* and another gentleman ſhould carry the ſurrender to *London*, and preſent it to his majeſty by the hands of the Chief Juſtice of the King's Bench; and that they ſhould endeavour to procure a new charter; and this inſtrument or order was made under the common ſeal of the town, to impower *Sir Thomas Billet* and the other accordingly. But it was further ordered, that before the ſurrender of the charter, a grant ſhould be made to *Sir Thomas Billet*, *Juſtice Turton*, and four others, of all the lands, &c. whereof the mayor, burgeſſes, and bailiffs were ſeiſed, in the right of the corporation, for one thouſand years next enſuing, upon truſt, to permit the ſaid mayor, &c. to diſpoſe of the rents and profits thereof for the maintenance of a miniſter in the ſaid borough, and for the relief of the poor inhabitants, as the mayor, bailiffs, &c. ſhould think fit, and to no other uſes whatſoever; and by indenture of the ſame date, a leaſe is granted, purſuant to the terms mentioned in the order, between the corporation of the one part, and *Sir Thomas Billet* and five others of the other part, reciting, that whereas the mayor, &c. were ſeiſed of the lands, &c. in queſtion in fee, and that whereas all or the greateſt part thereof were in the occupation of ſeveral burgeſſes, the profits thereof are applied for the relief of the poor and maintenance of a miniſter; and whereas the poor increaſe daily, the corporation grants the premiſes to *Sir Thomas Billet* and the other truſtees for one thouſand years, at a pepper-corn rent, upon this ſpecial truſt and confidence, that the leſſees ſhould make what improvement of the eſtates they could, and diſpoſe of the rents and profits to and for the maintenance of a miniſter and the relief of the poor, in ſuch proportion, and at ſuch times, as the mayor, &c. ſhould requeſt or direct; and in caſe the borough ſhould be diſcorporated, or there ſhould be no mayor, &c. then in ſuch proportion, &c. as twenty-one of the inhabitants of the ſame town, or the greater part of them, to be choſe on the firſt *Friday* after every *Michaelmas*, ſhould direct; and in caſe of any overplus over and above the maintenance of the poor and the miniſter, then to apply it to other public and charitable uſes, in ſuch form, &c. as the mayor, &c. and in caſe of no mayor as twenty-one inhabitants, &c. ſhould think fit; and upon further truſt, that the leſſees ſhould make aſſignments or grants, for ſuch terms, and upon ſuch covenants, rents, fines, &c. as the ſaid mayor, &c. or if none as the twenty-one inhabitants, &c. ſhould require.

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I have now taken notice of the leaſe, and the circumſtances under which it was granted, and it does not appear to me, that any of the leſſees had poſſeſſion of any part of this eſtate; but it appears, that the corporation, though they ſurrendered their old charter, and had taken up a new one, and acted under that, yet they were after, in *James the Second*'s reign, reſtored to their old charter, and continued in the receipt of the rents and profits; and by entries in the corporation-books, orders were made from time to time, by the mayor, &c. for the management of the eſtate, as owners of it: and it does not at all appear that the leſſees intermeddled with it; and from the year 1684 until 1735 this leaſe lay dormant and unthought of, and was then accidentally found among the writings of one of the leſſees then deceaſed, and an aſſignment made by the ſurviving executor of *Mr. Juſtice Turton*, who ſurvived the five other leſſees; upon the making of which this information is brought to have the benefit of it, and to eſtabliſh the term of one thouſand years; and relief conſequential upon it is prayed.

The firſt conſideration therefore is, What ground there can be for the relief that is prayed to eſtabliſh this term? And I think there is none, becauſe of the circumſtances and intention for which this leaſe was granted, and the ſubſequent facts that have happened ſince. The occaſion of this grant by the corporation was to protect their eſtate and poſſeſſion from the conſequences of ſuch illegal practices as were carried on againſt them at that time to compel them to ſurrender up their charter, and make a preſent of their liberties to the crown; and by the above order this appears to be their intention in regard to the granting this leaſe to the truſtees. It is ſaid, indeed, that this was done with a deſign to deceive the crown; but however I cannot much blame them for it, for what they could do according to law to ſcreen and protect their eſtates from ſuch cruelty as was offered them, they were well juſtified in doing; and I do not think there was any prejudice to the crown, for it aimed more at an influence and power over their perſons than eſtates. Beſides theſe eſtates that moved to the corporation from the hands of private donors, and the corporation leaſes or is diſſolved, the land will not eſcheat to the crown upon their diſſolution, becauſe, as *Lord Coke* ſays in his *Firſt Inſtitute*, 13. b. if lands are given to corporate bodies by private donors, and the corporation leaſes or is diſſolved, the land will not eſcheat to anybody, but will revert to the private givers. After this leaſe was granted, the old charter ſurrendered, and a new one taken up, *King James the Second* publiſhed a proclamation, declaring the new charters of all corporations to be void, and that all corporations might be at liberty to act under their old ones. It appears, that *Newcaſtle* deſerted its new charter, took up its original one, and acted under that. It happened, that all the corporations in the kingdom (except *London*, for which a particular act of parliament paſſed to reſtore its corporation to its antient footing), by virtue of this proclamation, ſubſiſted upon their old charters; and all illegal acts done under the new charter were reſcinded, as alſo all acts done

If lands are given to corporate bodies, and corporation leaſes or is diſſolved, the land will not eſcheat, but will revert to the donors.

Coke's Inſt. 13. b.

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in proſpect of the ſurrender of the old charter were to be done away in like manner, and therefore this leaſe; it being an act the corporation was obliged to do to ſhelter their eſtate; and it would be hard, after the crown has quitted its advantages, to ſet up this leaſe, now the new charter, which was the foundation of it, is aboliſhed; and it is plain the borough made this leaſe merely to guard their eſtate, for they have made a proviſion in caſe of a diſcorporation, which was by ſetting-up an aſſembly of twenty-one, of their own authority: and therefore, for all theſe reaſons, I am of opinion, that it is not fit to ſet up this term and eſtate of the truſtees, in reſpect of the circumſtances under which it was granted; for the inconvenience which the corporation apprehended has not happened, and the mayor, &c. have continued for a great length of years in the poſſeſſion, have made leaſes, &c. and done the higheſt acts of ownerſhip without interruption.

It has been inſiſted for the defendants, that the evidence that ariſes from the want of poſſeſſion in the truſtees, and the acts of ownerſhip of the corporation, notwithſtanding the leaſe, proves, that this leaſe was either refuſed by the truſtees, or amounted to a ſurrender in law. And it muſt be admitted, that it is as ſtrong a preſumption as if the ſurrender had been actually made at common law. But there is no occaſion to enter into that, though it is ſtrong reaſon why equity ſhould not interpoſe and carry it farther than at common law, by interpoſing and giving aſſiſtance to the truſtees. The poſſeſſion of the truſtees muſt be founded upon the leaſe; and if the truſtees had entered, they would have been barely truſtees to the corporation, and ſubject to the control of the governing part of it; and ſo are the clauſes of the leaſe, though the profits are to be applied for charitable purpoſes, and leaſes are to be made, but the ſame are to be as the corporation ſhould direct, or the twenty-one inhabitants in caſe of a diſcorporation: and if ſo, what ground is there for equity to take away the poſſeſſion of *ceſtui que truſt*, for in this reſpect the point of authority is to be conſidered. Is the poſſeſſion of the *ceſtui que truſt* to be delivered to the truſtees, unleſs there is ſome groſs miſmanagement? No; equity never takes away the poſſeſſion from them, whether they are poſſeſſed for their own benefit, or for a particular purpoſe, without ſome reaſon for it; and I think there is no ground for it here, eſpecially after the great length of time.

The next conſideration is, as to the eſtabliſhment of the leaſe; and if there is no decree to eſtabliſh the term of one thouſand years, the conſequence is, that the aſſignment muſt fall of courſe. But there are more objections to the validity of the aſſignment than of the leaſe, though it is liable to all the objections of the original leaſe; for this aſſignment was made after the term of fifty-one years, during all which time the leaſe had laid dormant and unheard-of; and when it was found by accident, the aſſignment of it was made without the approbation of the *ceſtui que truſt*, and by the executor of the ſurviving truſtee, without applying to this Court for any

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direction; and I am of opinion that, upon theſe circumſtances, it would be impoſſible to eſtabliſh the aſſignment. If the term and aſſignment, therefore, cannot be ſet up, then whatſoever is prayed and built upon that foundation muſt ſink; and it is clear, no direction can be given for quieting the new truſtees in any part of the premiſes, or for delivering poſſeſſion, or compelling the tenants of any part of the charitable eſtates to attorn; therefore that part of the information that ſought theſe ſeveral reliefs muſt be diſmiſſed.

What remains is the general relief ariſing upon that part of the information wherein the attorney-general is proper plaintiff to eſtabliſh the charity in the name of the relators. And it is inſiſted for the relators, that, whatſoever ſhould become of the term or authority of the truſtees or aſſignees, it appears, that this eſtate, and the profits, are applicable to charitable uſes, which this Court ought to eſtabliſh: and the relators are right there, for it does appear that there is a charity which this Court ought to ſupport, though the information miſtakes the manner and form of it; yet there is no inſtance of an information being diſmiſſed for that, but the Court has eſtabliſhed the charity according to what the caſe requires. The defendants object, that it does not appear that there is ſufficient evidence that the eſtate in queſtion is a charitable one, or that the profits are applicable to charitable uſes, but that the eſtate in general is the corporation's, applicable to their common uſe, as to ſuch as they ſhall think fit and direct. This queſtion depends upon the evidence ariſing out of the original leaſe in 1684, and out of the uſage that has been ſince the making of it, which is now fifty-ſix years ago. As to the evidence, there is a ſtrong proof that the rents and profits are applicable to the charitable uſes therein-mentioned, for it is ſo expreſsly recited in the leaſe; which uſes were for the relief of the poor, and maintenance of a miniſter for the borough, and other public and charitable uſes therein-mentioned. This is an uſe abſtracted from, and independent of, the truſt afterwards declared; for if it had been barely a truſt, it might have been ſaid, that in caſe the leaſe cannot be made good, the truſts ſhall fail; and this is evidence that, antecedent to the leaſe, the rents of the eſtate were applicable to the ſame charitable uſes. And though it has been ſuggeſted, that the mentioning theſe uſes in the leaſe was to give a better colour to it, yet I cannot preſume that, unleſs there is evidence of a different application prior to this leaſe, and that the rents had been differently diſpoſed of. It does appear by the entries of the town's books, that this charity moved from private donors; and if the uſage has been for fifty-ſix years, that is a ſtrong evidence to ſhew, that the recital in the leaſe was true, becauſe a long uſage within memory muſt be received, and implies the ſame uſage to have been in being before in the very ſame manner, without ſome contradictory proof. This charity, indeed, has been applied in no uniform, but in a deſultory manner, for the corporation ſometimes allowed the miniſter more and ſometimes leſs, but the poor were continually maintained out of the eſtate, for no taxes have been levied. It appears, that the corporation

tion has placed out poor apprentices, which is another charity to which the eſtate is to be applied; and this uſage is to be taken very ſtrongly in this, for the corporation has reſorted to its old immemorial charity, which is quite antecedent to this new leaſe, which muſt be taken to be aboliſhed. So I am of opinion, that this eſtate is to be taken to be a charity, and the profits muſt be applied to ſuch uſes. But I ſhall conſider how the charity is to be in regard to the miniſter; and as to him, it muſt be eſtabliſhed and made certain, for the corporation giving him at one time leſs than at another was a breach of their truſt, therefore that muſt be ſent into an enquiry before the maſter, to ſee what ſhall be allowed ſuch miniſter. In reſpect to the poor, the profits muſt be applied for putting poor children apprentices, and the manner of applying it muſt be left to the corporation.

The laſt point, as to the conveyance of part of the charity eſtate and the leaſes, particularly thoſe to *Lord Gower* and the other to the defendant *Bourn*: As to the abſolute conveyances of any part of the eſtate ſince the making the leaſe in queſtion, it appears, ſome of them have been made of only very ſmall eſtates of no great value; and it does not appear, that the grantees had notice of this term of one thouſand years, or of the truſt; and in particular, *Lord Gower* had not notice, upon his having lands given him by the corporation for making their ſtreets more uniform; and I think, the corporation is only to account for the purchaſe money. As to the leaſes to *Lord Gower* and the other defendant *Bourn*, the information prays to ſet them aſide, upon the head of notice, and as not being made for full rent, but at too low a one. As to the notice, there is nothing that affects *Lord Gower*, though there is ſomething to affect the other defendant *Bourn*, for he was town-clerk. But I am of opinion, be there notice or not, if theſe leaſes are made at a full rent, that it is a proper management of the eſtate within the charitable uſe; for as the truſtees have not taken poſſeſſion or acted, or if they had they muſt have acted according to the direction of the corporation; and if it had directed them to have made leaſes they muſt have done ſo, and if they had done ſo there would have been no ground to ſet them aſide; the value of the leaſed lands comes out to be uncertain and doubtful; and that appears from the general nature of the evidence, for the relators go according to the judgment of perſons that ſet the preſent value; but that is very uncertain; for here are a parcel of old houſes, and they compute what they may be let for, from which others may differ. On the other hand, the defendants ground their evidence upon the ſmall rent reſerved annually by the corporation before the grant to the two defendants *Lord Gower* and *Mr. Bourn*; but that valuation is as uncertain as the relators evidence, becauſe the town might ſuffer the poor to live in them at a very ſmall rent, as they were part of the charity eſtate, and amongſt other uſes applicable to the ſupport of the poor; therefore, the Court not being able to make a perfect judgment of the value, there muſt be an enquiry before the maſter, Whether theſe leaſes were at an adequate rent? for I will not ſay a full rent.

The Attorney-General *againſt* Lord Gower.

Therefore the information, ſo far as it ſeeks to eſtabliſh the term of one thouſand years to the truſtees by the leaſe in 1684, or aſſignment thereof to plaintiff *Crew Offly* and others, dated 1735, or to quiet the aſſignees in the poſſeſſion of any part of the premiſes therein compriſed, or to compel the tenants of any part thereof to attorn to the ſame aſſignees, be diſmiſſed. But I do declare, that the rents and profits of the ſame eſtate ought to be applied to maintenance of a miniſter and relief of the poor of the ſaid town of *Newcaſtle*, and to the ſeveral other public, pious, and charitable uſes in the ſaid indenture of leaſe of 1684 recited and mentioned; and that the ſaid charity be eſtabliſhed. And let it be referred to the maſter to take an account of the rents and profits of the premiſes compriſed in the ſaid leaſe reſerved by the corporation ſince the time of the filing of the ſaid information, and how and to what purpoſes they have been applied and diſpoſed. Let the maſter enquire, what has been allowed, or is reaſonable to allow, yearly, out of the ſaid rents and profits, for the maintenance of a miniſter, as ſo much as has been allowed, &c. be paid to him by the corporation, but the quantity of ſuch payment to be ſubject to the further direction and order of the Court (Then follow directions concerning the poor). Let the maſter further enquire, what part of the lands compriſed in the leaſe has been ſold by the corporation ſince the leaſe of 1684, &c. and ſtate the ſame, &c. and reſerve the conſideration of the money raiſed by ſuch ſale as to the diſpoſal of it, &c. and take an account of the annual value of the premiſes, &c. compriſed in the leaſes for the two defendants *Lord Gower* and *Mr. Bourn*, and of the rent reſerved, &c. and whether it be adequate or ſufficient or not, &c. Reſerve all further directions, &c.

Decree.

Caſe 86.

Pomfret *againſt* Murray.

Weſtminſter, Michaelmas Term, 14. Geo. 2. 1740.

A. deviſed his real and perſonal eſtate to *B.* an attorney, who made the will, and *C.* in truſt to inveſt the perſonal eſtate in land, and ſettle the ſame on the defendant for life, with remainders over, and made the plaintiffs executors, and gave them 20l. a-piece. The plaintiffs refuſe to prove the will, unleſs the defendant would give them 300l *viz.* 100l. to *B.* and 200l. to *C.* The defendant covenants to pay theſe ſums accordingly; and the plaintiffs having proved the will file their bill for the allowance; and the Lord Chancellor refuſed ſatisfaction principally for that the plaintiff was an attorney, and from the evidence it appeared, he had urged difficulties to extort this allowance from the defendant; though, he ſaid, there might be caſes where ſuch allowance would be eſtabliſhed.

THE CASE was: *J. S.* by will, deviſed his real and perſonal eſtate to the plaintiff *Pomfret* (who was an attorney and made the will) and the other plaintiff, in truſt, to inveſt the perſonal eſtate in land, and to ſettle the ſame on the defendant for life; with ſeveral remainders over; and made the plaintiffs executors, and gave them twenty pounds a-picce. After the teſtator's death, plaintiffs, before they would prove the will, procured a covenant from the defendant within ſix months after they ſhall have exhibited the will to pay the plaintiff *Pomfret* one hundred pounds, and the other plaintiff two hundred pounds; the ſaid ſums to be raiſed out of the firſt dividends he ſhould be entitled to; and afterwards the plaintiffs to bring a bill of an account to have theſe ſums allowed.

LORD

POMFRET against MURRAY.

HARDWICKE, *Lord Chancellor.* This is a caſe of great conſequence, and of ſuch a nature as I have not known come before this court; and it is incumbent on the Court to proceed warily before they allow ſuch a demand. It has been objected, that a bill ought to be brought by the defendant to ſet this deed aſide. But I am of opinion, that the defendant is proper to inſiſt on his objection to this allowance in his anſwer; for as the plaintiffs have brought a bill for an account, and to have theſe two ſums allowed, if the defendant is right in his objection, the plaintiffs ought not to have this allowance. If ſo, then the queſtion ariſes on the merits. The points are two: FIRST, On the general reaſon, if any agreement of this kind ought to be allowed to take place? SECONDLY, Suppoſing ſome ſuch agreement might be good, whether this can ſtand? As to the firſt, Whether an agreement may be made by the *ceſtui que truſt* with the truſtee to make an allowance which ſhall be binding, I think there is no occaſion to determine. I ſhould think there may be ſuch a caſe, though this Court will be very tender: All courts of equity have conſidered truſts as honorary things; they burthen the party in honour, and in their nature are not things which he ſhould make an advantage of. Another reaſon is, that a truſtee who has the eſtate of another veſted in him has a great opportunity to make uſe of the power he thereby gains to diſtreſs the party, which this Court cannot prevent; therefore this Court has always held a hard hand upon them; yet poſſibly a caſe may ariſe where a truſtee may ſay, "I will not take upon me the "burthen of the truſt, unleſs you will make me an allowance:" and if he make no ill uſe of the power he has over the *ceſtui que truſt*, I will not ſay the Court will not make ſuch allowance. But I am of opinion, that is not the preſent caſe; I think here is evidence of impoſition, and an abuſe of the power they had in their hands. *Pomfret*, a man of law, is employed to make the will; is one of the perſons named executors, whether by his own procurement does not appear; he has a legacy; and the general rule is, where executors have legacies, it is preſumed to be for their trouble; if he had thought fit to have renounced the executorſhip, he muſt have loſt his legacy. *Pomfret*, being an attorney, was likely to make an advantage of this truſt, for there muſt naturally be a cauſe. The teſtator died the firſt of *June*; the next day there is a meeting to conſider of the probate of the will. *Pomfret* then ſays to the defendant, "Your uncle has put me in truſt, I cannot go through with it "unleſs you will give me more money." The defendant anſwered, "You ſhould have made that objection when you made the will;" and aſked what he would have. To this *Pomfret* ſaid, he would be moderate; he would have only one hundred pounds. The defendant does not acquieſce; but ſaid it was too much; he was willing to double his legacy, or he would take out adminiſtration himſelf. To this *Pomfret* anſwers, No; he would hinder him. It has been ſaid, the plaintiffs were at liberty to prove the will or not; that the defendant knew his power that he might take out adminiſtration: but that is not the point; it does not go on a

POMFRET *againſt* MURRAY.

miſunderſtanding of the law, but the ill uſe they made of the power they had. The defendant had got truſtees who declared, they would not prove the will, nor let him have adminiſtration; if he had ſued for adminiſtration they might have delayed him, and after all have proved the will. I conſider the caſe in this light: Here are two executors who make uſe of their power to extort this reward; therefore this differs from the caſe of a truſtee coming fairly and ſaying, "I will not take upon me the truſt, but renounce, if you "will not make me an allowance." The perſonal eſtate veſted in them, and could not be deveſted but by their renouncing, nor the real eſtate but by a conveyance. The recital in the deed of covenants, that it was at the defendant's requeſt, is falſe, and may be compared to a marriage brokage-bond not improperly, for that is as voluntary as this; yet the Court will not ſuffer ſuch bond to take place; and that is an anſwer to the plaintiffs turning the fraud upon the defendant. I think, on theſe circumſtances, theſe allowances ought not to be made.

Caſe 87. *Ex parte* Gumbleton.

Michaelmas Term, 14. *Geo.* 2. 1740.

Chancery will not grant a *ſupplicavit* on the *affirmation* of a *Quaker*.

HARDWICKE, *Lord Chancellor*. The preſent caſe is a motion on the behalf of *a Quaker* for *a ſupplicavit* of the peace againſt her huſband on *an affirmation*. There have been a great variety of caſes which have had relation to this. I find two precedents in point directly contrary to each other. One is the caſe of *Hilton v. Byron (a)*: the account I have of that caſe is, One *Hilton* prayed an attachment *propace* againſt one *Byron*, and offered to make *an affirmation*; but this being a criminal matter, the Court would not grant it without oath; this was on articles of the peace exhibited in the court of king's bench. Notwithſtanding this caſe, in the caſe *Ex parte Greaves (b)*, a *ſupplicavit* iſſued out of this court on an *affirmation*; but I take it for granted it paſſed *ſub ſilentio*; and I believe it was firſt moved in the court of king's bench; and that Court did take notice of it, and refuſed the motion.

S. C. 2. Atk. 70.

THE LORD CHANCELLOR refuſed to give any opinion without adviſing with the Judges; and denied the motion.

(*a*) Eaſter Term, 11. *Will.* 3. reported 3. Salk. 133.

(*b*) On the 14th May, 11. *Geo.* 1.

Crop

Crop *againſt* Norton. Caſe 88.

Michaelmas Term, 14. *Geo.* 2. 1740.

THIS was a bill brought by the plaintiff againſt *Thomas Norton* and *Robert Norton* his ſon, and others, to have a ſpecific performance of articles, whereby *Thomas Norton* covenanted to convey a leaſehold eſtate to the plaintiff. The caſe appeared to be, That *Richard Norton*, deceaſed, was poſſeſſed of the eſtate under a leaſe from the *Biſhop of Wincheſter* for three lives, of which his own was the ſurviving life. That in 1722 this leaſe was ſurrendered, and a new leaſe granted to *Richard Norton* and his heirs for his own life, and the lives of *Thomas Norton* and *Robert Norton*, relations to him. *Thomas Norton* paid fifteen hundred pounds for this renewal. That by deed-poll, dated the day after the leaſe, *Richard Norton* declared, that after his own death *Thomas Norton* ſhould enjoy the eſtate for his life, and that *Robert Norton*, ſon to *Thomas*, ſhould have it after his death. That *Richard Norton* continued in poſſeſſion until his death; after which *Thomas Norton* mortgaged this eſtate to the plaintiff, and in 1734 *Thomas Norton* ſurrendered the leaſe, and took a freſh one for his own life, and the lives of *Robert Norton* and *John Crop*, the plaintiff's ſon; and in conſideration of a further ſum of money covenanted to convey to the plaintiff. There was a croſs-bill by *Robert Norton* againſt the plaintiff and defendant *Thomas Norton*, to have a performance of the truſt of the deed-poll.

A. ſeiſed of a church-leaſe for his own life ſurrenders and takes a new one to him and his heirs for the lives of himſelf and of *B.* and *C.* two relations to him. *B.* paid the fine for renewal, which amounted to 1500l. and by deed-poll, dated the day after the leaſe, declared, that after his own death *B.* ſhould enjoy the eſtate for his life, and *C.* the ſon of *B.* ſhould have it after his death. *A.* continued in poſſeſſion until his own death; after which *B.* mortgaged, and articled for the ſale of it, and ſurrendered the old leaſe, and took a new one, and added the life of the mortgagee's ſon; and upon a bill to enforce the articles the queſtion was, Whether, as the fine was paid by *B.* and the leaſe taken in the name of *A.* it ſhould not be a reſulting truſt for *B.*? If ſo, the declaration of truſt by *A.* would be bad.—But

Upon this caſe the queſtion was, Whether *Richard Norton* ſhould be conſidered as a truſtee only for *Thomas Norton* in the renewed leaſe of 1722? or, Whether *Thomas Norton* ſhould have it for his life only, and afterwards to *Robert Norton*, according to the deed-poll?

MR. ATTORNEY-GENERAL *for Robert Norton the ſon.* The right *Thomas Norton* ſets up is, that he is a purchaſer of this eſtate by paying fifteen hundred pounds for the renewal of the leaſe. As to this it is clear, that *Richard Norton* was proprietor of the leaſe at the time of the renewal, and had a right of renewal, and that he did not deſign to give it up, for he enjoyed it during his life. They do not pretend there is any declaration of truſt but the deed-poll we mention. The deed-poll is produced by the mortgagee; and it is admitted it was put into his cuſtody by *Thomas Norton*; but they ſay it was to ſhew he paid the fifteen hundred pounds. *Richard Norton* was the proper perſon to declare the truſt. This is the title of *Thomas Norton*, and muſt bind him; for he cannot ſet up an implied truſt in oppoſition to this declaration of truſt. As to *Crop*, he had notice; he has not the legal eſtate; *Thomas Norton* had no power to ſurrender; and we do not claim under *Thomas Norton*, but prior to him.

decreed, that it was not a reſulting fine for *B.* and that he had no power to article for ſuch ſale; that if the whole conſideration for the new leaſe had moved from *B.* it would have been a reſulting truſt for him; but the new leaſe was made not only in conſideration of the fine, but of the ſurrender of the old leaſe.—S. C. 2. Atk. 74. 3. C. Bar. C. R. 179.

MR.

CROP *against* NORTON.

MR. LLOYD *for Thomas Norton.* This is not one of thoſe leaſes that go *ſucceſſive*, as named in the leaſe. *Richard Norton* could not have a right to renew, becauſe the biſhop might have let the leaſe run out. *Thomas Norton* paid the whole full conſideration; the leaſe was made to *Richard Norton* and his heirs. If it had reſted there, it would have been a truſt for *Thomas Norton*, who paid the money. *Richard Norton* only changes his life in one leaſe for his life in another. There was nothing unreaſonable or imprudent for a father to keep the eſtate in himſelf; though in the caſe of a ſon it was unreaſonable. *Richard Norton* ſhould inſiſt on his putting it out of his power. Nothing moved from him but his aſſent to the renewal. *Thomas Norton* has denied that he knew the eſtate was to go in this manner. The laſt thing is the deed-poll. We deny we knew of it until after *Richard Norton*'s death. This deed-poll is dated the day after the renewal of the leaſe, and recites, as ſoon as he heard of the renewal, in caſe of death he did, &c. It takes notice, that he had permitted *Thomas Norton* to renew in his and his ſon's name; and goes on and ſays, "I do give, &c." It is abſurd for him to ſay ſo, when he had nothing to give.

HARDWICKE, *Lord Chancellor.* That is the point in diſpute. The queſtion is, Whether the plaintiff is entitled to have a performance of theſe articles as againſt *Thomas Norton?* for there is no ground to compel *Robert Norton* the ſon to join. This general queſtion depends on the queſtion, Whether *Thomas Norton* appears to have a title to this eſtate? for if he has not, this Court will not decree an impoſſibility. It is agreed, that *Thomas Norton* has not the legal eſtate; the queſtion then will be, Whether he has the equitable one? for if he has, this Court will decree a performance. That queſtion will depend upon two conſiderations: firſt, The circumſtances of the tranſaction between *Richard Norton* and *Thomas Norton*, as to the renewal then made, and the conſequences reſulting from that tranſaction; and, ſecondly, the deed-poll.

As to THE FIRST, *Richard Norton* was abſolute owner. It is true he had but one life, but that is a valuable eſtate; and though he had but a life, he had a power of renewal, tho' ſuch as the biſhop could refuſe; but as to all other perſons it is conſidered as a right; and if the leaſe be afterwards renewed, the new leaſe ſhall follow the antient truſt; which ſhews this Court conſiders it as a right. This being ſo, *Thomas Norton* was his relation. It appears, that he thought fit not to renew himſelf, but to permit *Thomas Norton* to renew, provided he would pay the fine. What was the original agreement does not appear. It does appear that all the letters are not produced. I do not ſay that *Thomas Norton* could have produced them. But if all were produced, it is not probable they would ſhew the agreement, for the firſt letter takes notice of it as a thing known; but there is an expreſſion in one of them which may afford ſome light; that is, *Richard Norton*, in his letter to *Thomas Norton*, ſays, "I would not in your caſe omit it; it lets you into the eſtate, "and

" and thoſe after you." On the thirteenth of *Auguſt* 1722 the leaſe is renewed. What was the conſideration? It was the ſurrender of the former leaſe; and I believe you would find no other conſideration. The renewed leaſe is granted to *Richard Norton* and his heirs for his own life, and the lives of *Thomas Norton* and *Robert Norton*. The whole eſtate in law veſted in *Richard Norton*. It is taken for granted by the Counſel for *Thomas Norton*, that there would have been a reſulting truſt for *Thomas Norton*. But I ſhould be of a different opinion. The ground they go on is this, that where a purchaſe is made, the purchaſe-money is paid by one, and the conveyance taken in the name of another, there is a reſulting truſt for the perſon who paid the conſideration; but this is where the whole conſideration moves from ſuch perſon; but I never knew it where the conſideration moved from ſeveral perſons, for this would introduce all the miſchiefs which the ſtatute of Frauds was intended to prevent. Suppoſe ſeveral perſons agree to purchaſe an eſtate in the name of one, and the purchaſe-money by the deed appears to be paid by him only, I do not know any caſe where ſuch perſons ſhall come into this court, and ſay, they paid the purchaſe-money; but it is expected there ſhould be a declaration of truſt. This caſe comes up to the preſent. It might be a queſtion, Whether this fifteen hundred pounds was advanced by way of loan, or as the purchaſe-money? This therefore is far from being a clear caſe, that if there had been no declaration of truſt, it would have been a reſulting truſt for *Thomas Norton*. But then there is the deed-poll under the hand and ſeal of *Richard Norton*, which recites the leaſe made the day before, and goes on: "KNOW YE "THEREFORE, that having given my conſent that *Thomas Norton* "ſhould renew, I do declare my meaning is, and my deſire always "was, that *Thomas Norton* and his ſon ſhould have, &c. I do "hereby give, &c." Now this is a plain declaration of the truſt by a perſon who had the legal eſtate, and therefore a right to declare the truſt. But then it is ſaid, it would be hard to let him alone declare the truſt, and give away the intereſt *Thomas Norton* had purchaſed. I think this is part of the ſame tranſaction. The deed-poll bears date the day after the leaſe. It is ſaid, "I am ready "to give other ſecurity on delivering up of this." Therefore it is plain, his intention was to deliver this, and not to keep it himſelf. I take it was delivered to *Crop* after the mortgage; for though it is a fact capable of being proved, that this deed-poll was found among *Richard Norton*'s papers, yet it is not proved. Therefore I do not take it to be clear, that this was a private declaration. But ſuppoſe it was, if the leaſe had been for his own, *Thomas Norton*'s, life, and for the life of a ſtranger, there would be ſomething in the objection, that it could not be ſuppoſed that *Thomas Norton* would give ſo much for ſuch an intereſt; but as it is for the life of *Thomas Norton*'s own ſon, the objection falls; and it was natural for *Richard Norton* to inſiſt on, and for *Thomas Norton* to conſent to it. Therefore I think, from the nature of this tranſaction altogether, there is no ground to conſider this as a truſt for *Thomas Norton*. But as there is a declaration of truſt by a proper perſon, I muſt

CROP *againſt* NORTON.

CROP *againſt* NORTON.

I muſt take it on that, and therefore can take *Thomas Norton* to be owner of this eſtate for his life only. As to the leaſe in 1734, the eſtate muſt go in the ſame channel; but whether he ſhall be conſidered as an incumbrancer for the fine is a conſideration; therefore I cannot decree a performance of theſe articles.

Then as to the next queſtion, on the croſs-bill, if my opinion is right, the plaintiff *Robert Norton*, as againſt *Thomas Norton*, is entitled to have the deed-poll brought into court. But as againſt *Crop* it is objected he is a purchaſor; it is not ſufficient that he is a purchaſor, but he muſt be a purchaſor alſo without notice. On the articles he had notice, but on the mortgage he had not. It is material to me, that it does not appear that he had any legal eſtate; for the legal eſtate which was in *Richard Norton* is in his heir at law; for there is no ſurrender of that leaſe, and he is a truſtee for the perſon who has the right. I think, the deed-poll muſt be brought into court for the benefit of all parties.

Caſe 89. Hodſell *againſt* Buſſell.

Lincoln's-Inn-Hall, December 5, 1739.

A term on truſt for a life; then to *the heirs of the body* of *A.* begotten, or to be begotten, by *B.* her huſband, and to their *executors, adminiſtrators, and aſſigns*; and for want of ſuch iſſue, then over to *C.*; this is a good limitation over to *C* (*a*).

S. C. 2. Atk. 89. S. C Bar. C. 195.

HARDWICKE, *Lord Chancellor.* *Edward Buſſell* being poſſeſſed of a term for fifty-nine years in reverſion, after the expiration of a prior term, by indenture, dated the twentieth day of *January* 1731, aſſigned it to truſtees, their executors and adminiſtrators, upon the following truſts: FIRST, In truſt to raiſe a ground rent to be paid to the chief landlord, and ſubject thereto, "in truſt, "that the truſtees ſhall permit the defendant, *Grace Buſſell*, wife of "*Edward Buſſell*, to receive the rents and profits of the term of "fifty nine years, for and towards her better ſupport and maintenance, *if ſhe ſhall ſo long live*; and after her deceaſe, to the uſe "and behoof of *Edward Buſſell* the huſband for life; and after "the deceaſe of *Grace* and *Edward*, in truſt for the heirs of the "body of the wife begotten or to be begotten by *Edward* the "huſband, and to their executors, adminiſtrators, and aſſigns, for "and during the reſt and reſidue of the ſaid term; and for want "of ſuch iſſue, then in truſt for the ſeparate uſe of my wife's "daughter, *Henrietta Hodſell* (the plaintiff's wife), for life; "and after her deceaſe, then to the uſe of *William* and *Edward*, "ſons of the ſaid *Henrietta Hodſell*, their executors and adminiſtrators, for and during the reſidue of the ſaid term."

Edward Buſſell, the aſſignor, who created the term, is dead without ever having iſſue by his wife, who ſurvived him, and is defendant before the Court. *Henrietta Hodſell*, the daughter, who has a remainder in this truſt-eſtate, together with her huſband and ſon *Edward*, have brought their bill againſt the widow and truſtees to have the deeds and writings relating to the leaſehold eſtate, and to

(*a*) See Brooks *v.* Taylor, Moſeley, 288. Stephens *v.* Stephens, Caſes T. T. 228. Sheffield *v.* Lord Orrery, 3. Atk. 287. Pelham *v.* Gregory, 5. Brown's P. C. 435. Fonnereau *v.* Fonnereau, Dougl. 470. Marſh *v.* Marſh, 1. Bro. C. C. 293. Knight *v.* Ellis, 2. Bro. C. C. 570. Hockley *v.* Mawby, 3. Bro. C. C. 82. Fearne Cont. Rem. 407.

have

have the deed of truſt brought into court, to be ſecured for the benefit of all parties.

The general queſtion is, Whether the plaintiffs are entitled to have a decree for ſecuring theſe deeds and writings? and that depends upon the intereſt they have in the term. Againſt this intereſt claimed by plaintiffs, which is to have the benefit of this term after the death of *Grace Buſſell*, there now appearing no iſſue by her late huſband; the objection by defendant is, that the limitation to the plaintiff and ſon is too remote, and what the law will not allow of in the caſe of a term for years, or truſt of a term: and two reaſons have been relied upon from the deed and nature of the truſt.

FIRST, As this deed is penned, the whole truſt of the term is veſted in the defendant *Grace Buſſell*. But if that be not ſo, yet, SECONDLY, That the truſt of the term is diſpoſed of in contingencies to the heirs of the body of *Grace Buſſell*, by *Edward* her huſband to be begotten; and that if there had been ſuch heirs of the body, they would have taken the whole truſt of the term; and the event of there having been no ſuch iſſue of *Grace Buſſell* will not vary the caſe. Theſe objections are made to ſhew, that the limitation over to the plaintiff is too remote.

As to the firſt, I am of opinion, that the whole truſt of this term is not veſted in the defendant *Grace Buſſell*. It appears, that the words "heirs of the body of *Grace Buſſell* begotten, or to be "begotten, by *Edward* her late huſband," are words of purchaſe, and a deſcription of the perſon, and not words of limitation.

The words *heirs of the body*, or *iſſue*, though ſtrictly words of *limitation*, yet may be words of *purchaſe*.

Eq. Ab. 383. pl. 4.

It was admitted on both ſides, that the words "heirs of the "body" or "iſſue" may be words of purchaſe, and the authorities in the Books make that extremely plain, according to the circumſtances of the caſe; and though the words are ſtrictly words of limitation, yet they may be words of purchaſe. *Archer's Caſe* (*a*) is ſtrong to that purpoſe; and in that caſe, to make the firſt take and have only an eſtate for life, the reſolution did not turn upon the words "heirs male of the body," being in the ſingular number, but upon this, that the words of limitation being, "to the next "heir male of *A.* and the heirs male of the body of ſuch heir male," thoſe later words were ſuperadded to the firſt words. In the caſe of *Liſle v. Grey* (*b*), *Sir Thomas Raymond* goes further than that; and though there is a difference in the Books, whether that judgment was affirmed in the exchequer-chamber; yet TRACY, *Juſtice*, in the caſe of *Legat v. Shewel* (*c*), takes notice, that he looked into the record, and found that it was affirmed. Thoſe limitations are of eſtates of inheritance, and the laſt of them is in

(*a*) 1. Co. 63. This was a deviſe to the next *heir male of A.* and the heirs of the body of ſuch heir male.

(*b*) Raym. 278. 302. 315. 2. Lev. 223. S. C. Pollexf. 582. S. C. 2. Jones, 114. S. C. 2. Show. 6. S. C. 2. Atk. 91. S. C. 1. Freem. 462.

(*c*) 1. Eq. Abr. 389. 394. 2. Vern. 551. Rep. in Eq. 141. 1. Peer. Wms. 87.

the

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the case of a deed. If in the case of estates of inheritance, in which it is proper to admit of strict limitations in tail, the words "heirs "male of the body" may be turned into, and considered as, words of purchase, and not limitation, it will not be wondered at that, if in the case of a term for years (which do not properly receive a limitation in tail, in which words of limitation are not proper to be used), such limitations have also been made. Several cases were cited, *viz. Peacock v. Spooner (a)*, of which case I very lately, in the case of *Villers v. Villers (b)*, gave a particular account, which received different determinations, and there were great variety of opinions of the Judges, upon the appeal to the house of lords; but the decree was affirmed. There are other cases upon this question: *Dafford v. Goodman (c)*, *Webb v. Webb (d)*, and *Donn v. Merrifield (e)*; but I cannot rely upon that last case as any authority. The limitation was much like the present, *viz.* "ITEM, All other my "leasehold estates I devise to *A.* his executors, &c. to hold during "the term for the following uses: To *Catherine Donn* for life; "then to his (the testator's) brother *John* for life; then to such "person as *John* should marry; and after her death (the wife of "*John*), to the heirs of the body of my brother *John*, their execu-"tors and administrators, with remainder over;" and an issue was directed to try the validity of the deed, and not the construction of the will; for upon that deed it was that the title and power of the testator to devise depended. It is probable, that as to the account given by the Counsel of the sentiments of the Court, it was right; for if the Court had thought the limitations over had been bad, an issue would not have been directed, because that would have been vain; and it is probable the Court might be inclined that the limitation over was good; but that is too slight for me to lay any weight upon.

Donn v. Merrifield, at the Rolls, 27 Oct. 4 Geo. 2. not to be relied on, though like the present case, &c. The Court gave no opinion.

These cases of trusts of terms for years are all grounded upon the apparent intention of the party, and construction of the words favouring that intention.

The objection to this is by defendant, that these cases arise either upon marriage-settlements or wills; and that in the case of wills, they are always to be construed according to intention, but deeds receive a strict construction; but as to this construction, the case of *Lisle v. Grey* is an answer clearly; for that proves, that even in the case of an inheritance, and on a deed, if the intention appear to make the words "heirs of the body" to be words of purchase, and to constrain the Court to make that construction, then they ought to do it. As to the distinction between this case and those that arise upon marriage-provisions, there is more weight in that; but there all the cases cited before depended upon the intention of the party appearing upon the deed; and if that was not the rule for the Court to ground themselves, the foundation would fail.

In deeds as well as wills, where it appears that the word *heirs* should be understood as a word of purchase, this Court will decree it so.

(a) 2. Vern. 43. 195. 2. Freem. 214. 1. Eq. Abr. 362.
(b) 2. Eq. Abr. 305.
(c) 2. Vern. 362. Prec. Chan. 56. 2. Freem. 228.
(d) 1. Peer. Wms. 32.
(e) 8. Viner. Abr. 222.

In

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In the caſes of voluntary ſettlements and terms for years, in truſt, if the intention appear, it ought to prevail; and there is no difference between that and marriage-ſettlements; but in the latter, the Court will ſometimes make a more favourable and ſtronger conſtruction to comply with the intention of the party, and to create a ground of contract, than they will in caſes of voluntary ſettlements.

A truſt declaring the benefit of a term to *ceſtui que truſt*, if ſhe *ſhould ſo long live*, is of the ſame import as if it had been given to her *for her life only*.

A gift to *A.* for *life only, et non aliter*, and to the *heirs*, or *iſſue*, of *his body*; here *heirs* or *iſſue* are words of purchaſe; for a conſtruction ſhall not be admitted to enlarge an eſtate contrary to the word *only*.

The queſtion is, Whether the intention of the party, here expreſſed by the words of this deed, requires this conſtruction, that the words "heirs of the body, &c." ſhould be conſtrued words of purchaſe? And I think clearly it does, and that more ſtrongly than any one caſe upon terms for years that has been cited; and I think the words uſed here, declaring the truſt for the benefit of the wife, are of the ſame import as if it had been given to her "*for "her life only*;" for the words are in the firſt place "to permit "the defendant *Grace Buſſell* to receive the rents and profits for "and during the ſaid term, for and towards the better ſupport and "maintenance, *if ſhe ſhould ſo long live.*" It was admitted in the argument, if the words had been "for her life only," that would have turned the words "heirs of her body" into words of purchaſe; and this has been ſo adjudged in the caſe of a freehold eſtate. In 1. *Vent.* 231. a caſe was cited there, where the words were, "to "*J. S. et non aliter*, and to the heirs or iſſue of the body;" and they were held words of purchaſe. In the caſe of *Backhouſe v. Wells* (*a*), the firſt limitation there being for life only turned the ſubſequent words into words of purchaſe, and could not be conſtrued to enure by way of enlargement of the words to the firſt taker, in contradiction to the word "only." Here the words "if ſhe ſhall ſo long live" make it contingent, on condition that if ſhe live out the whole term ſhe ſhall have it, but if ſhe do not ſhe ſhall not: ſo that theſe words are in the affirmative, and imply a negative.

Daſford *v.* Goodman. Peacock *v.* Spooner.

The words that make this ſtronger than *Daſford v. Goodman* (*b*) or *Peacock v. Spooner* (*c*) are the words "to the heirs of her body, "their executors, adminiſtrators, and aſſigns;" which amount to a declaration, that the executors and adminiſtrators of the heirs of the body ſhould take this term, and not her executors and adminiſtrators, and amount to a declaration of the intention to veſt the whole property of the term in the manner as the words are uſed, *viz.* "in the heirs of the body, their executors, and adminiſtrators," and not in *Grace Buſſell* herſelf. And the addition of the words "their executors and adminiſtrators" proves, that it was not the party's intention that this term ſhould go to all the heirs of the body in ſucceſſion, ſo as to include all the heirs of the body for ever; but that it ſhould veſt in ſome particular perſon.

(*a*) Poſt. . 1. Eq. Abr. 184. (*b*) 2. Vern. 362. Prec. Chan. 96. 2. Ld. Ray. 1439. 2. Stra. 731. (*c*) 1. Eq. Abr. 362. 3. Freem. 214. 8. Mod. 261. 10. Mod. 186. Fort. 2. Vern. 43. 195. 450. Gilb. 20.

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The words *heirs of the body* make a tail in freehold, or veſt the whole property in terms, from a preſumption of law, that it includes all heirs for ever. But where a limitation of a term is *to the heirs of the body, and the executors and adminiſtrators of ſuch heirs*, the preſumption is taken away.

The reaſon why the words "heirs of the body" make a tail in freehold, or veſt the whole property in the term, is from the preſumption of law, that it includes all the heirs for ever; but here it is to go "to the heirs of the body, their executors and adminiſtrators:" THEREFORE I THINK, the whole truſt of this term is not veſted in *Grace Buſſell*, and that the words "heirs of her "body" are not words of limitation but of purchaſe, and deſcriptive of the perſon to take after her death.

The objection is, that ſuppoſing "heirs of the body" to be words of purchaſe, yet the whole intereſt of the term would veſt in ſuch heirs of the body, in caſe there were ſuch, and conſequently that the limitation over would be ſtill too remote; for it is ſaid, where a limitation over in contingency is "to the heirs of the body," or "to a firſt ſon, and the heirs of his body," though that contingency never happens, and there is never a ſon born, yet that the limitation is too remote, and that let that event fall out how it will, it will not alter the law.

I ſhall not conſider the caſes of *Stanley v. Leigh* (*a*), *Clare v. Clare* (*b*), *Saberton v. Saberton* (*c*), *Gore v. Gore* (*d*), and *Gower v. Groſvenor* (*e*), whether a limitation over after a tail in contingency is good, where the contingency never happened or veſted, becauſe, upon the penning of this limitation over, there is no occaſion for it; for if the words "heirs of the body of *Grace Buſſell*, &c." are words of purchaſe, then this is no limitation in tail; for it is the ſame as if a limitation had been "to her eldeſt ſon by *Edward* "*Buſſell* her huſband; or in caſe of no ſon, then to the daughters, "their executors and adminiſtrators."

The whole truſt of the term is by theſe words expreſsly limited either in the ſons or daughters that ſhould be heirs of the body; for the words "their executors and adminiſtrators" ſhew, that the intention was to veſt the whole truſt of the term in ſome particular perſon, and not that the truſt of the term ſhould go in ſucceſſion to the heirs of the body. If it is to veſt in a particular perſon, then at the time of ſuch veſting it is impoſſible it ſhould go on, according to the expreſſion "from heir of the body to heir of the body, and to "the executors, &c. to each heir of the body;" therefore when there is a limitation "to the heirs of the body, their executors, "&c." it muſt veſt in the firſt taker as much as if it had been a limitation "to a firſt ſon, his executors and adminiſtrators; or in "caſe of no ſon, then to the daughters, their executors and adminiſtrators." And if this be the conſtruction of theſe words, "heirs of the body, their executors and adminiſtrators," conſider then the effect of the ſubſequent words of the limitation over, *viz.* "and for want of ſuch iſſue, then in truſt for *Henrietta Hodſell*, "&c." If the former words "heirs of the body," and the words "for want of ſuch iſſue," will be the ſame as if it had been ſaid,

(*a*) 2. Peer. Wms. 686.
(*b*) Caſes Temp. Talb. 21.
(*c*) Caſes Temp. Talb. 55. 245.
(*d*) Ante, 4. 10. Mod. 502. 2. Peer. Wms. 28. 2. Stra. 958.
(*e*) Bar. Ch. Rep. 54. Poſt. 249.

"for

"for want of ſons or daughters of *Grace Buſſell*, by *Edward* "her huſband to be begotten" (for the words "ſuch iſſue" in the limitation over muſt receive the ſame conſtruction as the words "heirs of the body;" "*as*" uſed before for the word "ſuch" confines the words to the ſame as the heirs of the body is); this is not too remote, for it muſt be known at the time of the death of the huſband, or nine months after, whether there will be any iſſue: and that brings it to the caſe of *Gore v. Gore*; and it is common with a caſe of a limitation of the truſt of a term to limit it to the firſt ſon, if there be one; and if there be not, then to the daughters; and if no daughters, to the executors or adminiſtrators of the father. Perhaps it may be objected, that this does not differ from the caſe of a limitation to a firſt ſon and the heirs of his body, which was the caſe of *Stanley v. Leigh* (*a*), *Higgens v. Dowler* (*b*), *Clare v. Clare* (*c*), and *Saberton v. Saberton* (*d*): but that objection will not hold, for the conſtruction differs from all thoſe caſes; and in that caſe above the whole truſt of the term was contended to veſt in the firſt ſon by conſtruction of law only to avoid a perpetuity, becauſe it was ſaid, that there was an intent to create an intail of a chattel; but there is no ſuch intent, if the conſtruction I have put is right; for when the limitation is "to the heirs of the body, "their executors and adminiſtrators," this muſt be the conſtruction, *viz.* to the firſt ſon, and if no ſon, then to the daughters, their executors and adminiſtrators. In the caſes put of the words "iſſue" or "heirs of the body," they are *nomina collectiva*; and the words "for want of ſuch iſſue" mean iſſue *in infinitum*. In the preſent caſe, it muſt mean heirs of the body born within a reaſonable time after the death of the huſband. Here it is "heirs of the body" by expreſs words; in the other caſe, it is only by conſtruction of law.

Therefore I think, the conſtruction that ariſes from the words, and the difference that ariſes in this from all the other caſes, makes it a plain caſe; and if ſo, the plaintiff muſt have theſe deeds and writings.

DECREE, That the plaintiff *Henrietta Hodſell* and *Edward* her ſon are entitled to the reverſion of ninety-nine years term after the deceaſe of the defendant *Grace Buſſell*, according to the deed of the twentieth of *January* 1721; and I therefore decree, that the defendant do bring it before, and leave it with, THE MASTER.

(*a*) 2. Peer. Wms. 686.
(*b*) 1. Salk. 1569. 1. Peer. Wms. 98.
(*c*) Caſes T. T. 21.
(*d*) Caſes T. T. 35. 245.

Caſe 90.

Newſtead *againſt* Johnſon (*a*).

Tueſday, 15*th July* 1740.

A. by will directs 3000*l.* out of his ſtock in trade to be laid out in lands to be ſettled to the uſe of his firſt ſon in tail, and gave the reſidue of his joint ſtock and partnerſhip in trade to *B.* his executors, adminiſtrators, and aſſigns, and willed that he ſhould become partner with *C.* but declared the gift to *B.* to be in truſt for his daughter the wife of *C.* and to be at her ſeparate diſpoſal, notwithſtanding her coverture, and made his ſaid daughter ſole executrix; and there being no diſpoſition of the reſidue; it was DECREED, the daughter ſhould take the reſidue, notwithſtanding the bequeſt to her uſe; for that by this bequeſt in truſt the teſtator only intended his daughter a proviſion independent of her huſband, who he deſigned ſhould take the reſidue with his wife.

S. C. 2. Atk. 45. S. C. Bar. C. R. 94.

THE TESTATOR, *William Lawſon*, directed three thouſand pounds out of his ſtock in trade to be laid out in lands to be ſettled to the uſe of his firſt ſon in tail male, with remainders over; and as to all the reſt and reſidue of the joint ſtock and partnerſhip in trade, &c. he gave it to *John Senior*, his executors, adminiſtrators, and aſſigns; and his will and deſire was, that *Allen Johnſon*, his ſon-in-law, and he, agree to be partners, and enter into articles as Counſel ſhould adviſe; and as to his ſaid deviſe to *John Senior*, he declared the ſame to be in truſt only for his daughter, *Elizabeth Johnſon*, for her ſole and ſeparate uſe during her life, and for ſuch other uſes and purpoſes as ſhe ſhould appoint by any deed or writing in her life-time, or by her laſt will, notwithſtanding her coverture; and his will was, that the ſaid *Allen Johnſon*, his daughter's huſband, ſhould have nothing to do with the ſame, or any part thereof, or receive any part thereof, otherwiſe than as joint partner. Then the teſtator, after giving ſeveral directions about partnerſhip, makes his daughter *Elizabeth Johnſon* ſole executrix.

The teſtator afterwards died; and his debts and legacies being paid, there remained a large ſurplus, for an account of which the bill was brought, and that the executrix might be a truſtee of the ſame for the next of kin to the teſtator.

MR. BROWN, *for the plaintiff*, inſiſted, that it was a general rule, that the giving an executor a legacy prevented his taking the reſidue, and made him a truſtee for the next of the teſtator's kin; that a deviſe in truſt of a ſeparate ſtock in the partnerſhip, ſo that the executrix's huſband ſhould not intermeddle, was not any exception to that rule. Suppoſe a teſtator gives a legacy to *A.* in truſt for *B.* and makes *B.* his executor, that legacy ſhall prevent his taking the reſidue, notwithſtanding its being deviſed in truſt, for that makes no difference.

To which THE LORD CHANCELLOR agreed.

MR. NOEL and MR. MURRAY, *for the defendants*, anſwered, that although the diſtinction between a legacy given to an executor who was a relation to the teſtator and an executor who was a ſtranger, had been often over-ruled in the later caſes; yet that where a legacy was given to the executor, not expreſsly, but by being excepted out of a deviſe to another perſon; or where the legacy given to the executor anſwered any particular purpoſe, and was not inconſiſtent with his taking the reſidue; there it could not be preſumed that the teſtator meant to exclude him from it: *Stabitur præſumptioni donec probetur in contrarium.* They cited the caſe of *Foſter*

(*a*) NOTE, This caſe was taken from the manuſcript of MR. PICKERING. MSS.

v. Munt,

v. Munt (*a*), the firſt caſe in point of time; the caſe of *Griffiths v. Rogers* (*b*) was next; the next caſe was in 1709, of *the Ducheſs of Beaufort*, in the houſe of lords (*c*), where the decree for a diſtribution was reverſed, and the ſurplus of the perſonal eſtate adjudged to the executrix. The next in time was *Weſtcomb v. Jones* (*d*), being about two years afterwards, and was determined upon the ſame reaſoning, and diſtinctions; and *Ball v. Smith* (*e*), which is allowed in *Prec. in Chan.* 566. upon another ground.

HARDWICKE, *Lord Chancellor.* The caſes in regard to excluding executors from taking the ſurplus of the perſonal eſtate, by reaſon of the particular legacies before given to them, have been very various, and undergone different determinations, according to the different circumſtances and opinions and way of reaſoning of different perſons concerning them; and it is abſolutely impoſſible to reduce all thoſe caſes to any certain or general rule, without ſome contrariety between them. But I think the preſent caſe a very plain one, that the executrix here ſhould not be excluded from the ſurplus.

The law is clear, that where a man makes his will, and an executor, it is a gift in law of all his perſonal eſtate to him; ſo is the rule of the eccleſiaſtical court. Therefore it is, that where a ſuit is brought in ſuch caſe for a diſtribution of the *reſiduum* undiſpoſed of by the will, this Court will prohibit them from proceeding in ſuch ſuit, becauſe they are bound to give the ſurplus to the executor; and this Court interpoſes upon a ſuppoſed truſt in the executor, of which that court has no cognizance. And I remember ſome caſes, one at the latter end of *Queen Anne*'s time, and another ſince, and a third when I ſat as Chief Juſtice at the King's Bench, where ſuch prohibitions have gone; ſo that the ground upon which executors have been in any caſes compelled to diſtribute the ſurplus, has been certain circumſtances in equity which have induced a violent preſumption that amounts to evidence that the executor was intended only a truſtee.

The firſt caſe was that of *Foſter v. Munt*, where it was firſt ſent to the maſter to enquire, what the ſurplus amounted to; and I have heard, that that aroſe in a great meaſure from an ill opinion which my LORD JEFFRIES had conceived of the executors behaviour in obtaining the will; and it being reported to amount to five thouſand pounds, he thought it was abſurd to ſay, that the teſtator would have given the executor ſo ſmall a legacy as ten pounds for his care and pains, if he had meant at the ſame time to give him the ſurplus; but there was no particular evidence of any fraud in that caſe, but only ſuch a general charge in the bill; ſo that the decree was founded wholly on that ſingle point (*f*).

(*a*) 1. Vern. 473. S. C. 1. Eq. Ab. 243.
(*b*) Prec. Ch. 231. S. C. 1. Eq. Ab 245.
(*c*) 2. Vern. 648. S. C. 1. Peer. Wms. 114.
(*d*) 1. Eq. Abr. 245.
(*e*) 2. Vern. 675.
(*f*) See Prec. in Chan. 567.

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From that time it was taken, that where a legacy was given to an executor for his "care and trouble," without any diſpoſition of the ſurplus, he ſhould be conſidered as a truſtee; and that was founded upon good reaſon, for ſuch a legacy "for care and pains" was a plain declaration of the teſtator's intention, that as to the reſt, the executor ſhould not take it to his own uſe; for it would be ridiculous to ſuppoſe, that the teſtator ſhould give him a ſmall legacy for his trouble in managing an eſtate for himſelf (*a*).

Chan. Preced. 169, 170.

Afterwards the Court went further on the like kind of reaſoning, and held, that where a particular legacy was given to the executor generally, without ſaying "for care and pains," even this would exclude him from the ſurplus, becauſe of the abſurdity, as no doubt there would be, in giving him ſome and giving him all; from whence the Court raiſed an implication, that ſince the teſtator had given him a part, he never intended him the whole: and this point is now eſtabliſhed, though it was at firſt objected, that the particular legacy might be owing to a doubt of the teſtator that the whole perſonal eſtate might not prove more than ſufficient to pay all the legacies, in which caſe the executor would not take a ſhilling; for which reaſon, the teſtator might be unwilling to leave him to the chance of the ſurplus, but would ſecure ſomething to him by a particular legacy, and then, in caſe of a deficiency, he would abate only in proportion. However, this point has been now long eſtabliſhed, and is not to be controverted by ſuch an argument. And I remember in the caſe of *Farrington v. Keetly* (that is the true name of the caſe, and not *Farrington v. Knightly* (*b*)), LORD MACCLESFIELD ſaid, that he had conſulted with *Mr. Vernon*, who had then left the Bar, who told him, that he did not trouble himſelf with taking notes of modern reſolutions upon this point, becauſe he looked upon it to be as plain and ſettled as that an eſtate to a man in fee ſhould deſcend to a man and his heirs. Other caſes have been determined in favour of the next of kin, upon the circumſtances of proximity of blood; but theſe diſtinctions have been over-ruled in latter caſes; particularly in the caſe of *Lady Granville v. the Ducheſs of Beaufort* (*c*), becauſe that reaſoning might produce great uncertainty. For if that diſtinction was to be admitted, then a diſtinction would ariſe as to thoſe of the neareſt degree of kindred and thoſe who are more remote; and if the teſtator's intent was to depend on ſuch circumſtances, it would bear a very uncertain conſtruction. However, in the caſe of *Ball v. Smith* (*d*), LORD HARCOURT did allow of this reaſoning in the caſe of a wife, it being after the reverſal in the houſe of lords of the decree in the *Ducheſs of Beaufort's Caſe*, upon which he founded his opinion. In that caſe, one of my LORD HARCOURT's reaſons was, that the particular legacy given by the huſband to the wife was only of what was her own before, and which ſhe had as

(*a*) See Davers *v.* Dewes, 3. Peer. Wms. 43. Joſlin *v.* Brewitt, Bunb. 112. Southcote *v.* Watſon, 3. Atk. 228. Andrews *v.* Clark, 2. Vezey, 162.

(*b*) Prec. in Ch. 566.

(*c*) 1. Peer. Wms. 115. S. C. 2. Vern. 648.

(*d*) 2. Vern. 675.

executrix

executrix from her firſt huſband. But that reaſon would hardly ſupport the determination, becauſe whatever ſhe had before the marriage became the abſolute property of the huſband by the marriage, and conſequently was as much a gift from the huſband to the wife by his will as if it had been of any other part of his eſtate. However, I ſuppoſe the Court might make uſe of that point in order to difference it from the *Caſe of the Ducheſs of Beaufort*, where THE CHANCELLOR diſallowed the argument of proximity of blood: ſo that theſe diſtinctions, and the notion of proximity of blood and *hæres ab inteſtato* as to a *reſiduum* undiſpoſed of, have not prevailed *(a)*. I mention theſe things to lay them out of the caſe; for the ground of my determination is, that this legacy is given to a wife of ſtock in trade, in truſt for her ſeparate uſe, and under very particular circumſtances. Upon the nature of this legacy, I AM OF OPINION, that it comes expreſsly within the reaſoning of the caſes of *Griffyth v. Rogers* *(b)*, and of *Lady Granville v. Ducheſs of Beaufort*, both of which were determined before that diſtinction made by LORD HARCOURT, in *Ball v. Smith* *(c)*, was introduced. In the firſt of thoſe caſes, the teſtator made his wife executrix, and gave to another all his books, except ten ſuch as his wife ſhould chuſe, as plays, romances, ſermons, but not law-books; and the queſtion was, Whether this was ſuch a legacy as would exclude her from the ſurplus of the other perſonal eſtate? And the Court held, that it would not, it being no deviſe to her, but only an exception out of a gift to another; and upon this the caſe of *Lady Granville v. Ducheſs of Beaufort* was founded. There *the Duke of Beaufort* deviſed the uſe of his table-plate to *the Ducheſs* for life, and after her death to *the Marquis* his grandſon, and made *the Ducheſs* executrix; and THE LORD CHANCELLOR held, that ſhe was only a truſtee for the ſurplus; but it appears by MR. VERNON's report, that my LORD COWPER himſelf was apprehenſive that this decree would not be final; and he admits, that the argument of the deviſe operating only in nature of an exception was the ſtrongeſt exception, though on the ſtrength of the former authorities he decreed againſt *the Ducheſs*; but upon appeal, that decree was reverſed in the houſe of lords the twelfth of *December* 1715, and the ſurplus given to *the Ducheſs*. It is very difficult to come at the particular reaſons upon which the determinations by the houſe of lords are founded, becauſe they are an aſſembly wherein a great many declare no reaſon for their opinion; but I have looked into the printed caſe, and in the appellant's caſe I find this diſtinction very ſtrongly relied on, that the gift of the plate to *the Ducheſs* for life did not carry ſuch an implication, that the teſtator meant thereby to exclude her from the reſidue, for the legacy is only by way of exception; and if he had meant otherwiſe, he would have given her the plate abſolutely, and not barely the uſe of it, and after her death to his grandſon. And this

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Proximity of blood no argument to entitle an executor to a *reſiduum* not diſpoſed of, where he has an expreſs legacy that by implication would otherwiſe exclude him from ſuch reſidue.

A legacy to an executor in nature of an exception will not preclude him from the reſidue.

(a) See Randal *v.* Bookey, 2. Vern. 425. Martin *v.* Rebowe, 1. Brown's C. C. 154.

(b) Prec. in Chan. 231. S. C. 1. Eq. Abr. 245.

(c) 2. Vern. 675.

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caſe is there put: Suppoſe *the Duke* had deviſed the plate to *the Marquis* after his wife's death, ſhe would have had the uſe of it in the mean time, and yet it cannot have excluded her from the reſidue; and it was ſaid, there was the ſame reaſon why it ſhould not in that caſe. The printed caſe, indeed, contains other reaſons, which are mentioned in *Mr. Peere Williams* and *Vernon's Reports*, on the parol evidence and hearſay of the drawer of the will, who was dead; but they were not regarded. Beſides this printed caſe, I have heard ſome lords, who joined in giving that judgment, mention this as the reaſon; and I have heard it mentioned likewiſe as a reaſon in this court; and I think it a very ſolid one.

Then THE QUESTION will be, Whether this truſt-legacy comes within the reaſon of the two former caſes? And I AM OF OPINION it does, becauſe the general reaſon of *the Ducheſs of Beaufort's Caſe* was, that the gift of the plate to her for life was conſiſtent with the teſtator's intention to give the ſurplus to her, by virtue of his making her executrix. Here the intent of the teſtator is manifeſt; he gives the particular legacy in truſt for the wife, who was his daughter, becauſe otherwiſe it would have paſſed to the huſband as his abſolute property; for though upon her death it would have paſſed from her to the adminiſtrator *de bonis non*, yet the huſband would have it in point of property and intereſt, as he would be entitled to it after the debts and legacies were paid out of the aſſets; which reaſon does not extend to the *reſiduum*, for that it does not; but he intended, the huſband ſhould have that as well as his daughter, and no implication can ariſe upon a will but by a neceſſary conſtruction. If ſo, the teſtator had no occaſion to make an expreſs deviſe of that in truſt, as he did of the other.

It was ſaid, that a particular legacy given in truſt for an executor will have the ſame effect in point of law, and bar him of the *reſiduum*, as much as if the legal intereſt of the legacy were given him; and that is certainly true, becauſe it implies nothing which makes any difference between ſuch a deviſe in truſt and an abſolute one; but, as I ſaid before, here was a particular reaſon why this legacy was expreſsly given in truſt, for the huſband could not have been otherwiſe excluded; and it is, that the truſtee may enter into partnerſhip with the ſon, and he is to improve the ſtock for the ſeparate uſe and benefit of the wife, which prevents the common implication, that the *reſiduum* ſhould not paſs. And this diſtinguiſhes it from the caſe of *Willis v. Brady* (*a*), laſt Term, before THE MASTER OF THE ROLLS at *Weſtminſter*: There the teſtator gave the ſurplus of his perſonal eſtate to his daughter for life, whom he made executrix, and gave one moiety over to another perſon; the queſtion was, Whether this gift of the ſurplus for life to the daughter, with a moiety over, was ſufficient to exclude her from taking the ſurplus as executrix? And THE MASTER OF THE ROLLS held, it was ſufficient to bar her; though it was urged by the Counſel, that the legacy, being under

(*a*) See the caſe at large, Bar. Ch. Rep. 64, 65.

a reſtriction,

a reſtriction, might be extended to exclude the gift of the moiety to the ſtranger. I do not know upon what grounds THE MASTER OF THE ROLLS made his decree; but I ſhould have founded my opinion in that caſe upon its being a particular intereſt given to her *for life*, which implies a negative of any other intereſt greater than *for her life*. But here is no ſuch circumſtance in the preſent caſe, there being no expreſs deviſe of the *reſiduum*, even for life, to the daughter.

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THEREFORE I THINK, there is no ground to make the executrix account for the ſurplus; and as to that the bill muſt be diſmiſſed.

Sterling *againſt* Penlington. Caſe 91.

Lincoln's-Inn-Hall, 25th February 1739.

A. UPON the death of her huſband entered, and was ſeiſed in fee as *tenant in common* of one fourth part of an eſtate; and was likewiſe *tenant in dower* of one other fourth part, being a third part of the remaining three-fourths; and as to the other moiety of the whole eſtate, ſhe was ſeiſed as *guardian in ſocage* to her ſon. The ſon went abroad, and died under age; upon which his ſiſter became intitled; and then the mother was *guardian in ſocage* to her. The daughter married and died under age. But before her death a bill was brought by the huſband and wife for an account of the rents and profits; which the mother refuſed to give, or let the daughter occupy, imagining the ſon to be then alive. By the decree, an account was directed, with a reſervation of liberty to apply for further directions. The plaintiff and his wife likewiſe brought *an ejectment* againſt the mother, and recovered; and upon the reſervation

A. on her huſband's death entered, and was ſeiſed in fee of one-fourth of an eſtate; was tenant in dower of another fourth; and guardian in ſocage to her ſon of the remaining moiety. The ſon died abroad, by which *B.* his ſiſter became intitled; *B.* marries, and ſhe and her huſband bring a bill for an account and an ejectment at law. An account was decreed; after which *B.* dies: and the queſtion was, If *B.* had ſuch a ſeiſin as to give her huſband a right of tenant by the curteſy? And decreed that ſhe had, for that the ſeiſin of the mother as guardian was a ſeiſin of the daughter; though THE

THE QUESTION was, Whether, the mother receiving the profits and continuing in poſſeſſion as *guardian in ſocage*, there was ſuch a ſeiſin of the daughter of this eſtate during the coverture as would entitle the huſband to be *tenant by the curteſy?*

FOR THE PLAINTIFF were cited, *Cro. Jac.* 475. *Salk.* 285. 2. *Co.* 190. *Moor*, 59. 4. *Co.* 373, 374. *Carter*, 176. and *Plowd.* 536.

HARDWICKE, *Lord Chancellor.* I had at firſt a doubt, whether the huſband could be a *tenant by the curteſy* or not; but now I think he is ſo, both in law and in equity. As to the point, whether an ejectment, and a confeſſion of leaſe, entry, and ouſter, is a ſufficient entry to make ſeiſin in deed, and ſo the huſband *tenant by the curteſy* after the wife's death, it is not neceſſary to be determined at preſent; but if it were, I ſhould think it is not a ſufficient entry to make him *tenant by the curteſy.* There have been many reſolutions

LORD CHANCELLOR ſaid, that an ejectment without confeſſion of leaſe, entry, and ouſter, would not make a ſeiſin ſufficient to give the huſband ſuch a title.—S. C. 2. Eq. Abr. 730. S. C. 7. Viner, 149. S. C. 14. Viner, 512.

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with regard to the force and effect of an entry by ejectment; and at a meeting of all the Judges, in HOLT's time, in the third year of *Queen Anne*, it was determined, that a confeſſion of leaſe, entry, and ouſter, or delivering an ejectment, will be a ſufficient entry for non-payment of rent. But they ſaid, they ſhould not have gone ſo far, had it not been for the former reſolutions to that effect. But they held, it would not be a good actual entry to avoid a fine, or the ſtatute of Limitations, unleſs upon a proceeding in the ſame action on that ejectment; but in another action after the twenty years it would not. This is a ſtrong determination, that delivering an ejectment, or the rule for confeſſion of leaſe, entry, and ouſter, is not ſufficient to make an actual entry (*a*), and therefore that it would not make ſuch a ſeiſin in deed as will make the huſband *tenant by the curteſy*; but he ought to have made an actual entry after the death of his wife (*b*).

An ejectment and confeſſion of leaſe, entry, and ouſter, without further proceeding, not ſuch an actual entry as will be ſufficient to avoid a fine, or the ſtatute of Limitations.

But upon other reaſons I am of opinion, that the huſband in this caſe ought to be *tenant by the curteſy*.

Upon THE FIRST POINT, that the entry of the mother as *tenant in common* of one fourth part would be a ſufficient entry of the daughter during the coverture to make her huſband *tenant by the curteſy*; it is true, as ſaid by *Hob.* 120. that a *tenant in common* may enter three different ways: by claiming and receiving the profits for himſelf and companion, which is the moſt clear; or by claiming the whole for himſelf only, but that is not an actual entry for the other, but to his excluſion; or he may enter generally, and that ſhall be adjudged for himſelf and companion, becauſe all general entries muſt be conſtrued according to the right of the caſe. The father died; the mother entered, and was ſeiſed of one fourth part as *tenant in common*, of another fourth as *tenant in dower*, and as to the other moiety as *guardian in ſocage* to her ſon; and that was the ſeiſin of the ſon; and ſo ſhe continued during the ſon's life. It is ſaid, notwithſtanding, that ſhe holding over after the death of the ſon is an excluſion of the daughter, becauſe ſhe refuſed to let her enter, or to account for the profits; but that was not claiming for herſelf, but inſiſting her ſon was living; which was a miſtake in fact, he being then dead. At common law, an action of account would not lie by one *tenant in common* againſt his companion, unleſs he had made him his bailiff; and ſo is LORD COKE: and that was the occaſion of 3. & 4. *Anne*, c. 18. by which the law is altered, and an action given generally to one tenant in common againſt the other; and therefore one tenant in common cannot enter in ſuch manner as to exclude his companion, but by expreſs words, becauſe then the action of account will lie againſt him by that act, and then this muſt be a ſeiſin of both; for an action of account will not lie by one tenant in common againſt another, unleſs he has been in poſſeſſion, for ſince this act of parliament there muſt be an actual ouſter: but the mother

(*a*) See Berrington *v.* Parkhurſt, Stra. 1208. S. C. Andr. 125. S. C. 4. Bro. P. C. 353. Oates *v.* Brydon, 3. Burr. 1897. Goodright *v.* Cator, Dougl. 486. Jenkins *v.* Pritchard, 2. Wilſ. 45.

(*b*) See Fitchet *v.* Adams, 2. Stra 1128.

admits

admits herſelf to be tenant in common with ſomebody; therefore it is reſted only upon this, that the poſſeſſion of the mother was a ſufficient ſeiſin of the daughter during the coverture. But it appearing the ſon died in 1727, and the daughter then an infant, and did not marry till four years after, that ſhews the mother was ſeiſed as tenant in common with her daughter as to a fourth part, and as to the other moiety ſhe was ſeiſed as guardian to her daughter; for the law will adjudge it, that ſhe received the profits as guardian to her daughter, and that will be the ſeiſin of the daughter; for let her be in poſſeſſion in any way whatſoever, the law will conſider her as guardian to her daughter: if ſo, the daughter marries, and her declarations afterwards will ſignify nothing; for if there be any ſeiſin of the wife during the coverture, the diſſeiſin afterwards will not vary the caſe, if ſhe was ever actually ſeiſed; for notwithſtanding ſhe is diſſeiſed afterwards, the huſband will be *tenant by the curteſy*, becauſe the ſeiſin of the wife during the coverture is what gave him the title. Thus it is at law, and in this court it is ſtronger. The huſband and wife bring a bill againſt the mother, and there is a decree to account for the profits accrued during the wife's life, with a reſervation for further directions; which proves that the wife was ſeiſed; for if ſhe had not been by law ſeiſed, they could be entitled to no account. And upon this reſervation I am bound to proceed upon the ſame principles as that decree; and if I am to adjudge the ſhare of the profits of the land accrued, due in the life-time of the wife, to belong to the huſband, it would be an abſurdity if I did not likewiſe adjudge the ſame land itſelf to belong to the huſband, and that he ſhould be tenant by the curteſy after the wife's death; for it would be contradicting the decree in terms.

STERLING *againſt* PENLINGTON.

THEREFORE I THINK, the huſband is tenant by the curteſy, &c.

Gower *againſt* Groſvenor and Piggot *(a)*.

Caſe 92.

Trinity Term, 13. & 14. *Geo.* 2. *In Chancery.*

SIR THOMAS GROSVENOR gave by will to his niece, the plaintiff, ſeveral legacies, who brings this bill to have them ſecured; and *Sir Thomas* not having left ſufficient aſſets exclu-ſively,

A. deviſes his real eſtate to *B* his brother for life; then to truſtees to preſerve contingent remainders; remainder for his firſt and other ſons in tail, with power to make jointure; *and if his ſaid brother had no ſon, or if he had and ſuch ſon died without iſſue male*, then to *C.* and his firſt and other ſons in like manner; and willed, that *his plate, jewels, &c. ſhould go to the heirs male of the family ſucceſſively, as his real eſtate is ſettled, as much as they could by law. B.* died, having no ſon, and the limitation to *C.* held to be good by way of executory deviſe *(b)*. —S. C. Bar. C. R. 54. S. C. 2. Eq. Abr. 327. 2. Vezey, 180. 3. Atk. 288. 3. Term Rep. 143.

(a) This caſe was taken from the manuſcript of MR. SHORT.

(b) See the caſe of Hodſell *v.* Buſſell, ante, 236.

THE

GOWER against GROSVENOR AND PIGGOT.

THE QUESTION was, Whether certain jewels and plate, &c. which *Sir Thomas* was entitled to under the will of *Sir Richard Grosvenor* ſhould be taken to be part of his perſonal eſtate?

HARDWICKE, *Lord Chancellor*. Limitations of perſonal eſtates whereby they are to deſcend in the ſame manner as real ones, are very common, and are with great reaſon allowed when they are not contrary to law; but diſpoſitions of this nature, as well as others, muſt be ſubject to the rules of law, and if inconſiſtent with them cannot be valid. I ſhall conſider the clauſe in the will of *Sir Richard Grosvenor* upon which this queſtion ariſes in two lights: the one, as it relates to the precedent limitations of the real eſtate; the other, as a directory clauſe to the executors. *Sir Richard* having an intention to ſettle his real eſtate, and to limit part of his perſonal eſtate together with it, as far as the law would permit, makes his will, and deviſes his real eſtate to *Sir Thomas Grosvenor* his brother for life; remainder to *Robert Piggot* and his heirs, to ſupport contingent remainders; and after his ſaid brother's deceaſe, for his firſt and other ſons in tail, with liberty to make a jointure; "and if his ſaid brother has no ſon, or if he has, and ſuch "ſon dies without iſſue male, then to *Sir Robert Grosvenor* and "his firſt and other ſons in the ſame manner. ITEM, his will was, "that his plate, jewels, library of books, and furniture of his "manſion-houſe, at, &c. and alſo of his dwelling-houſe at *Weſt-"minſter*, ſhould go to the heirs male of the family ſucceſſively, "as his real eſtate is ſettled, as much as they can by law."

This laſt clauſe muſt be conſidered as including every part of the limitation of the real eſtate, except that to truſtees; and the ſame conſtruction muſt be made as would have been if it had been in ſo many words, "My will is, that my plate, &c. ſhall go to "*Sir Thomas* for life, and then to his firſt and other ſons in tail "male; remainder to *Sir Robert for life*, and then to his firſt and "other ſons in tail male."

It is urged, that although *Sir Thomas* never had a ſon, yet the limitation of the perſonal eſtate to *Sir Robert* is void, for the not happening of the contingency will not alter the caſe; and the remainder of a perſonal thing after ſuch a limitation of it as would make an eſtate-tail in the caſe of a real eſtate, is void. Since *Manning's Caſe* (*a*) and *Lampet's Caſe* (*b*), the Courts have carried executory deviſes much further, and have held them good even after a contingent eſtate-tail that never veſted. And I cannot but think there is a great difference in the reaſon of the thing between an executory deviſe after an eſtate-tail contingent and a veſted eſtate-tail. In the latter caſe, no event that happens can make it good, as a deviſe to *A.* in tail, remainder over, for there is no contingency, but the limitation over is upon facts that are certain. In the former caſe, the limitation over depends upon the happening of the contingency;

(*a*) 8. Co. 94. (*b*) 10. Co. 46.

as

as where there is a deviſe to *A.* for life, remainder to *A.*'s firſt ſon in tail; in which caſe, before the ſtatute of 10. & 11. *Will.* 3. c. 14. a poſthumous ſon of *A.* could not have taken. So if a tenant in fee deviſe to *A.* and his heirs; and if he die without iſſue in the life of *B.* then to *B.* and his heirs; if *A.* dies without iſſue in the life of *B.* the remainder is good; if not, it is void. The happening or not happening of the contingencies in theſe caſes makes the limitations good or bad; and great violence would be done to the intention of the teſtator if it ſhould be otherwiſe. The words upon which the preſent queſtion depends take in two contingencies: the one is, "if *Sir Thomas* has no ſon;" the other, "if *Sir Thomas* has "a ſon, and ſuch ſon dies without iſſue male." And the words taking in theſe two contingencies, the determination, as I have before ſaid, muſt be the ſame as if they had been expreſſed, for what is neceſſarily implied is as expreſſed; and then the firſt limitation over will undoubtedly be good. So is the caſe of *Lodington v. Kime* (*a*), where there was a deviſe to *A.* for life; and in caſe he has any iſſue male, then to ſuch iſſue male and his heirs for ever; and if he die without iſſue male, then to *B.* and his heirs for ever; and this is but making the deviſe good by an event clearly within the intent of the teſtator.

The old caſes go a great way in denying this doctrine; and it is true my LORD TALBOT thought otherwiſe in a caſe that came before him (*b*). The caſes of *Backhouſ v. Wells* (*c*) and *Burgeſs v. Burgeſs* (*d*) are the two oldeſt. The firſt was, A limitation of a term to a man for life; remainder to his firſt and other ſons in tail; and for default of ſuch iſſue, remainder over: the other was, A term limited in juſt the ſame manner; and the remainders were held void, though there was a default of iſſue. LORD NOTTINGHAM gives the ſame reaſons for both theſe reſolutions in different words: The firſt, he ſays, looks like a perpetuity, and the ſecond has the proſpect of a perpetuity; which I muſt ſay, as LORD VAUGHAN does in a particular caſe, I think is a very ſpongy reaſon, and ſuch a one as I can by no means come into; for is it enough to ſet aſide a diſpoſition, that it looks like a perpetuity, though it is not really one? LORD NOTTINGHAM did not conſider the double contingency neceſſarily employed; for in both caſes, though the limitation over upon contingency would have been void, yet upon the other it was good. LORD COWPER, upon the demurrer in the caſe of *Higgins v. Dowler* (*e*), gave his opinion, that, the contingency not happening, the deviſe over was good; but this is not to be taken as a judicial determination. The caſe of *Vachel v. Vachel* (*f*) is very material in the preſent queſtion. It was a

(*a*) Salk. 224.

(*b*) *Quære*, If this was not the caſe of *Clare v. Clare*, May 1734.

(*c*) 1. Eq. Abr. 184. 2. Ld. Ray. 1439. 2. Stra. 731. 8. Mod. 261. 10. Mod. 186. Fort. 450. Gilb. Rep. Ch. 20.

(*d*) 1. Mod. 114. Pollexf. 40. Finch. C. R. 91. 1. Chan. Caſes, 229.

(*e*) Salk. 156. 2. Vern. 600. 1. Peer. Wms. 98.

(*f*) 1. Eq Abr. 361. 2. Chan. Rep. 151. 1. Chan. Caſes, 129.

deviſe

GOWER *against* GROSVENOR AND PIGGOT.

deviſe of the uſe of ſeveral paintings, books, &c. to teſtator's wife for life; and my will is, "that if ſhe be with child of a ſon, "that then after her deceaſe the ſame paintings, &c. ſhall be left "and come to the ſame ſon; but if my wife be not with child of "a ſon, or if the ſame ſon ſhall die without iſſue male of his body, "then my will is, that all my ſaid paintings, &c. after the deceaſe "of my ſaid wife and death of ſuch ſon as my wife is now with "child of, ſhall come and remain to the uſe of *Thomas Vachell*;" and upon advice with the Judges, and being aſſiſted by two of them, THE LORD KEEPER, with THE JUDGES, were of opinion, that the deviſe to *Thomas Vachell* was good in law, the contingencies upon which it was made never happening. The not happening of the contingency is likewiſe given as the only reaſon for the determination in *Wood v. Saunders (a)* and *the Duke of Norfolk's Caſe (b)*; which reſolutions ſtrongly ſupport the extrajudicial opinion, if you will, of my LORD COWPER. I do not think the words, "and if neither of them leave iſſue, &c." were much relied on in the caſe of *Saberton v. Saberton (c)*, though I cannot certainly ſay ſo; for the Judges, upon a reference to them, do not certify their reaſons, and I have not had an opportunity to enquire into them. In the caſe of *Forth v. Chapman (d)*, indeed, theſe words were much relied on; but there was no limitation to the heirs male. I have mentioned the general reaſon which weighs with me; but there is no occaſion at preſent for me to determine this ſo litigated a point, for there are other words in this will that exempt me from that neceſſity, *viz.* "as much as by law they "can;" by which words the teſtator has cleared himſelf of all ſuſpicion of having deſigned a perpetuity, the true conſtruction of which is as far as by the common law of this kingdom and the rules of this court they can. Now he might have limited this perſonalty to *Sir Thomas* for life, then to his firſt ſon in tail, and if he has no ſuch, remainder over, or until ſuch ſon come of age, and then to him and his heirs, and if he die before he come of age remainder over, which the common courſe of conveyancing proves; and ſo are the caſes of *Taylor v. Biddal (e)* and *Maſſenburgh v. Aſh (f)*.

Perſonalty limited to *H.* for life, then to his firſt ſon in tail; if he has none ſuch remainder-over good.

2. Mod. 289. 1. Vern. 235. S.C. Swyn. 187.

SECONDLY, This general clauſe in the will of *Sir Richard Groſvenor* is to be conſidered as directory; for here is no expreſs gift, but a general declaration only. Indeed, if he had ſaid, "my "will is, that ſuch a one ſhall have my pictures, &c." this had been an abſolute deviſe; but theſe things veſted in the executors; and I think, the legal property muſt be conſtrued to be in them; ſo that *Sir Thomas Groſvenor* had only the uſe of them. Such clauſes as theſe are often inſerted in marriage-articles, and are common in wills where the teſtator had leaſehold eſtates to diſpoſe of. And I

(*a*) Pollexf. 35. 1. Chan. Caſes, 131. 2. Chan. Rep. 239.
(*b*) 1. Eq. Abr. 192. 3. Chan. Caſes, 1, Pollexf. 223.
(*c*) Annally Rep. 413. Caſes T. T. 55. 245. 2. Eq. Abr. 349.
(*d*) 2. Eq. Abr. 292. 359. 1. Peer. Wms. 663. Fitzg. 317.
(*e*) 2. Mod. 289.
(*f*) 1. Vern. 235.

think

think the moſt reaſonable conſtruction, and that which always ought to be put upon them, is that which I have made in the preſent caſe, *viz.* that they are directory and executory. In *Serjeant Maynard's Caſe (a)*, truſtees were inſerted, though there were none in the will; but that defect is ſupplied here by the words "as far as by law they can."

Therefore I declare, that the plate, &c. limited by will of *Sir Richard* to *Sir Thomas* for life, then to his firſt and other ſons in tail, remainder to *Sir Robert*, was not part of the perſonal eſtate of *Sir Thomas*, and that *Sir Robert* is intitled to the ſame.

(*a*) 2. Freem. 1.

Harvey *againſt* Harvey *(a)*. Caſe 93.

Chancery, Michaelmas Term, 13. Geo. 2. 1739.

If a power, in which the intention of the parties is clear and evident, be executed defectively as to part, and afterwards executed defectively as to the whole of the intereſt, a court of equity will, in favour of a purchaſor for a valuable conſideration, reject the firſt appointment, and ſupply the defects of the ſecond.

S. C. 1. Atk. 561. S. C. Bar. C. R. 103. S. C. 2. Eq. Ab. 669.

HARDWICKE, *Lord Chancellor*. *Edward Harvey*, the father of the defendant, was ſeiſed of ſeveral lands for life under a marriage-ſettlement with his firſt wife; remainder to the defendant *Michael Harvey* in tail male. Theſe two being thus ſeiſed, in 1715 conveyed thoſe lands, upon the marriage of *Michael Harvey*, to the uſe of *Edward Harvey* for his life; as to part of his lands to his wife for her jointure, remainder to the firſt and other ſons in tail male, remainder over. No recovery was ſuffered; ſo that the uſes did not properly ariſe at common law. In this deed of ſettlement is reſerved a power or proviſo, by which it is agreed, that if *Elizabeth Harvey*, the preſent wife of *Edward*, ſhould die in the life-time of *Edward*, and he ſhould marry another wife, that *Edward* might ſettle ſo much of the lands on her as ſhould amount to ſix hundred pounds a-year for her life, by way of jointure. That *Edward Harvey* is to be conſidered as a purchaſer for a valuable conſideration, becauſe, being tenant for life of the whole, he parted with part of the eſtate to the ſon in conſideration of that agreement; which is ſufficient to make good the ſettlement. *Edward Harvey*'s firſt wife died before him, and he afterwards married with the plaintiff *Mary Harvey*, then *Mary Carteret*, on whom a ſettlement was made in 1715, by which all the lands compriſed in this power, which were valued at nine hundred pounds a-year, were conveyed to truſtees, and to their heirs, during the life of the ſaid *Mary Harvey*, then *Carteret*, upon truſt to raiſe out of the rents and profits one hundred pounds a-year for *Mary* for pin-money as long as they both ſhould live; and after the death of *Edward Harvey* to raiſe and pay her two hundred pounds a-year for her life as her jointure, and to permit the remainder-man to receive the reſidue. Afterwards *Edward Harvey* makes a further ſettlement of the ſaid lands to the ſame truſtees, and under the ſame truſts, to pay her three hundred pounds a-year more as an additional jointure. Some time afterwards, in

(*a*) This caſe was tranſcribed from the manuſcript of MR. SHORT. MSS.

1731,

HARVEY against HARVEY.

1731, another deed of ſettlement was executed by *Edward Harvey* to the ſame truſtees of the ſame lands, upon truſt to raiſe and pay to the ſaid *Mary Harvey* his wife ſix hundred pounds a-year for her life; which ſaid ſix hundred pounds was to be paid in lieu and ſatisfaction of all former jointures and ſettlements, except the one hundred pounds pin-money, which was ſtill to be paid her during their joint lives. Soon after this laſt ſettlement, *Edward Harvey* died, living *Mary* his wife, who brought her bill here againſt the truſtees and the heir at law, *Michael Harvey*, to have this ſettlement put in execution, and the annuity of ſix hundred pounds a-year paid her.

Upon theſe ſettlements TWO QUESTIONS will ariſe:

FIRST, What is the conſtruction of this power?

SECONDLY, The ſeveral acts that have been done by *Edward Harvey* towards the execution of it.

It is a power given to *Edward Harvey* to charge ſo much of thoſe lands, by way of ſettlement on any after-taken wife, as would be ſufficient to raiſe ſix hundred pounds a-year; but the eſtate was not to be exempt from taxes, &c. and to be conveyed only for the life of ſuch wife; whereas here the whole lands are conveyed to truſtees for ever, and a clear annuity of ſix hundred pounds ſettled on the wife.

Then as to the ſeveral acts of *Edward Harvey*, here is firſt a ſettlement for valuable conſiderations before marriage; another after marriage, which is voluntary; and a third, which drowns the other two; and as for the whole ſix hundred pounds a-year by way of annuity. Now upon this caſe thus ſtated, and upon conſidering the power, it appears, that the execution of it by the ſettlement made in 1725, precedent to the marriage of *Edward Harvey* with his ſecond wife, is void both in law and equity.

In law, becauſe the power given to *Edward Harvey* is to ſettle ſo much only of the lands as ſhall not exceed the yearly value of ſix hundred pounds, whereas he has ſettled the whole lands. By the power he was to ſettle it to her for her life, &c. whereas he has conveyed it to truſtees for ever; which is alſo bad, the power not being purſued. Then he was only to ſettle ſo much of the lands as ſhall not exceed the yearly value of ſix hundred pounds, but not to be exempt from taxes and other incident charges, whereas he has charged them with a clear annuity of ſix hundred pounds; which is alſo void in law.

In equity it is alſo void, becauſe neither party can have that which was ſtipulated for them; but not ſo void as that the wife ſhall have no proviſion made for her.

Edward Harvey could not charge the lands with any annuity at all, becauſe the remainder-man was not intended to be affected with the charge; for he could not tell what profits the lands would produce.

HARVEY *againſt* HARVEY.

produce. A ſettlement made to truſtees and their heirs in truſt to raiſe an annuity for the wife's life is not a complete jointure, for a jointure muſt be to the wife herſelf.

I would conſider upon this power what the wife is to have. The remainder-man was to have the eſtate over and above the jointure taken out of it, whereas the wife by the ſettlement has a clear annuity of three hundred pounds a-year, charged upon the whole of the eſtate. This is a very different intereſt than what he had ſtipulated for in the marriage-ſettlement of his father, conſidering the jointreſs could not ſtipulate to have this three hundred pounds a-year; for *Michael Harvey* was not obliged to ſubmit either in law or equity. The utmoſt the Court would do would be to make the ſix hundred pounds a-year to ſtand as a ſecurity for the three hundred pounds a-year. So that it appears, neither of the parties can have what was ſtipulated for them.

Equity will ſupply the defective execution of powers in favour of purchaſors, creditors, wives, and younger children.

It has been admitted, and very rightly for the defendant, that this Court does relieve againſt defective executions of powers, and aid them on behalf of purchaſors, creditors, wives, and younger children (*a*), for wives and children in ſome degree are conſidered in equity as creditors by nature; but the wife in theſe caſes muſt be otherwiſe unprovided for; and here, if *Mary Harvey* cannot have the benefit of the firſt ſettlement, according to the marriage agreement, then ſhe is to be conſidered as a wife unprovided for, and will be entitled to the benefit of the latter ſettlement. I will ſuppoſe that no ſettlement at all had been made upon the plaintiff before her marriage, but after her marriage a voluntary one, and without any conſideration, and *Edward Harvey* had made an execution of this power of the lands of ſix hundred pounds to his wife defectively, and ſhe had come here after his death to have that aided; the Court would have done it to the whole extent of the land, otherwiſe ſhe would be entirely unprovided for; and where that is the caſe, the Court never conſiders whether there is any ſort of exceſs in the quantity at the time of the execution of the power; for if there is a power voluntarily executed for the wife, ſhe ſhall have the benefit of it, unleſs there are ſuſpected circumſtances that equity can lay hold of; as any fraud, undue influence, or impoſition on the huſband, none of which appear, or are ſurmiſed, in the preſent caſe. There are many caſes of this kind. In that of *Smith v. Aſhton* (*b*), there was a proviſion merely voluntary, and a defective execution of the power; and they came here to have it ſupplied, and the Court did it. The caſe of *Tollet v. Tollet* (*c*), at THE ROLLS, 10th *Auguſt* 1728, was of the ſame ſort, except

(*a*) See Watts v. Bullas, 1. Peer. Wms. 60. Goodwyn v. Goodwyn, 1. Vezey, 228. Byas v. Byas, 2. Vezey, 164. Kettle v. Townſend, 1. Salk. 187. Hawkins v. Leigh, 1. Atk. 387. Cook v. Arnham, 3. Peer. Wms. 283. Smith v. Baker, 1. Atk. 386. Marſton v. Gowan, 3. Brown. C. C. 170. Chapman v. Gibſon, 3. Brown. C. C. 170.

(*b*) 1. Chan. Caſes, 264. Eq. Abr. 345.

(*c*) 2. Eq. Abr. 663. 2. Peer. Wms. 489.

only

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only that it was in the caſe of *a will*. There *George Tollet* the father gave the eſtate to truſtees to the uſe of his ſon for life; remainder to truſtees to ſupport contingent remainders; remainder to firſt and other ſons in tail; with remainder over; and he gave a power to his ſon, by any deed or writing under his hand and ſeal, to limit and appoint any part of the eſtate for a clear jointure to any wife he ſhould marry: after the death of the father, the ſon ſurvived, but was an infant, and he intermarried with the plaintiff, and then made his will ſigned and ſealed by himſelf, reciting the power, and gave to the plaintiff, as a proviſion and jointure, the eſtate in queſtion, in ſatisfaction of her dower; and then died, leaving the defendant an infant: the widow brought her bill to have the benefit of this proviſion: upon which there were two queſtions: Whether the execution of the power was good in law? and if not, Whether it ought not to be made good in equity againſt the remainder-man? THE MASTER OF THE ROLLS was of opinion, that it was not a good execution of the power at law, becauſe it was to be executed by deed, whereas this was by will: and upon the ſecond point, he thought it ought to be ſupplied, though this was by will, and merely voluntary: the cauſe ſtood over to have the will fully proved; and when it came on again, he was of this opinion: THE ATTORNEY-GENERAL, when he cited this caſe, ſaid, that the MASTER OF THE ROLLS thought the word *deed* to be a peculiar one, and laid it down as a maxim in equity, that all defective executions of powers ſhould be ſupplied in favour of a wife and younger children; and made a decree in favour of the wife (*a*). The caſe of *Carter v. Carter* (*b*), at THE ROLLS, *June* 20, 1730, was of a proviſion for younger children, where the power was defectively executed in law, without any conſideration of marriage, and merely voluntary; and there was a decree to aid. The caſe was thus: *T. Carter* deviſed eight thouſand pounds in truſt to be laid out in land to be ſettled upon his nephew *George Carter* for life; remainder to his firſt and other ſons in tail; remainder to truſtees for fifteen years, without impeachment of waſte, in truſt to raiſe portions for daughters, to be paid at ſuch time and manner as he ſhould appoint in *writing to be atteſted by two witneſſes*; and there were ſeveral other limitations over to *William Carter*, and his firſt and other ſons; and power was alſo given to *George Carter* to make a jointure to his wife. In 1703, *William Carter*, the next remainder-man after failure of iſſue male of *George Carter*, brought his bill againſt *George Carter*, to have the eight thouſand pounds laid out. *George Carter* inſiſted upon the power he had of raiſing portions to the daughters by his own appointment, and making a jointure to a wife; and ſays *by his anſwer*, "I do "appoint all the rents and profits of the lands to be purchaſed "with the eight thouſand pounds for fifteen years ſhall be collected "and applied for raiſing portions for my daughter; but in caſe of "more, then to be equally divided between them." And the decree

(*a*) See 8. C. Forreſter's Rep. 272. (*b*) Caſes Temp. Talb. 272. 2. Eq. Abr. 30.

was

was made for laying out the money; but before a purchaſe was made *George Carter* died, without any other appointment of the power. *William Carter* brought his bill to have the benefit of the decree, for the eight thouſand pounds to be laid out in lands, to have it himſelf, becauſe it was limited over to him in tail. It was brought againſt the daughters and widow of *George Carter*, and they by their anſwer inſiſted upon the benefit of the power, and the widow inſiſted upon the articles made in conſideration of marriage, and the agreement before; and by virtue of them, it was covenanted to ſettle the eſtate to be purchaſed to himſelf for life, remainder to her for life. The daughter inſiſted, that ſhe was intitled to the term of fifteen years by virtue of the appointment by the father in his anſwer under this agreement; but if that was no appointment, then ſhe inſiſted to have it by the will. The MASTER OF THE ROLLS decreed, that the articles were to be conſidered as a good execution of the power of appointment of the jointure. The agreement before marriage did not appear but by recital. The next queſtion was, concerning the fifteen years term, Whether that was to be for the benefit of the daughter? And the firſt queſtion was, that ſuppoſing there was no execution of the power, yet there ſhould be one for the benefit of the daughter. And ſecondly, Whether what was mentioned in the anſwer was a good execution of the power. HIS HONOUR thought, that the anſwer was no execution of the power; that the fifteen years term ſhould be conſidered as for the benefit of the daughter; and was of opinion, that it was not a good execution, but ought to be conſidered as a defective one in equity, and therefore proper for the Court to relieve; and decreed accordingly: and that as to the articles for the execution of the power, they were to be conſidered as articles in purſuance of an agreement before marriage in writing. Upon theſe authorities, and many others that might be cited, there can be no doubt but that a tenant for life with power to make a jointure, if he execute it after marriage, and without a valuable conſideration, for a wife not otherwiſe provided for, that the defective execution of the power ſhall be aided in equity, and ſupplied. If ſo, the wife here muſt be entitled to her jointure contracted for before marriage, or to the proviſion made after marriage. I think, *Mrs. Mary Harvey* cannot have the proviſion made for her before marriage, becauſe that is contrary to the power, both in point of circumſtance and ſubſtance; for inſtead of allotting her ſix hundred pounds a-year ſubject to charges and reparations, that charge is of a clear annuity of three hundred pounds.

If I was to decree her ſomething contrary to the contract upon the reſervation of the power by the father and the ſon, or contrary to the ſtipulation of the wife, in neither of theſe caſes ſhould I be juſtified; and if I ſhould decree the ſix hundred pounds a-year to be a charge upon the land out of which the ſix hundred pounds a-year is given, I ſhould decree ſomething different from the power, and from

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what is contracted for. If this execution of the power is void in law, ſhe is a wife unprovided for; and then the queſtion is, Whether ſhe ought not to have the benefit of the ſettlement made for her upon her marriage? And I think ſhe is clearly within the authority of both the caſes I have cited, and within the rule laid down here for a wife unprovided for.

The preſent queſtion differs from all the other caſes cited, and I do not know of any under theſe circumſtances. The plaintiff relies upon the ſupplying a defective execution of a power, where it was executed for a valuable conſideration, but if voluntary, that it ſhould not be aided: and this general rule here is laid down in ſeveral caſes. The determination of *Bayley v. Montague* (*a*) was upon a different reaſon; for there the Court relied upon the caſe of *Sir John Huſſey v. Lord Faulkner* (*b*), and that was a defective execution of a power by tenant for life for a mere voluntary conſideration. The caſe of *Orby v. Lady Mohun* (*c*) was an uncertain execution of a power, and impoſſible to be reduced to certainty; there were no creditors, purchaſers, younger children, or wife unprovided for; and it is not ſaid, where a wife is in ſome degree provided for, that a defective execution of a power ſhall not be aided; but the caſes import, that the preſent plaintiff cannot have the benefit of the firſt ſettlement, and if ſo the wife is unprovided for by any contract, and therefore within the rule of ſupplying defective executions for the benefit of wife and children by will. There have been many caſes where defective executions of powers have been ſupplied, where the wife or children have had other proviſions beſides what was given them by ſuch execution; as where there is a copyhold deviſed for the benefit of younger children who have had proviſions by marriage-ſettlement, the Court will make good that defective deviſe where the heir at law has had a reaſonable proviſion; ſo that it is no objection, that the wife is in part provided for. In the caſe of *Week v. Eams* (*d*), the plaintiff was a creditor of *Sir A.* ſon and heir of *Sir Charles*, and brought his bill to have a ſatisfaction out of the real and perſonal eſtate of the defendants. The daughters of *Sir Charles* inſiſted, as to ſome copyhold lands, that they were deviſed to *Sir A.* to his mother for life, and then to them; but that there had been no ſurrender. This being a proviſion for younger children, it was ſaid the ſurrender ſhould not be ſupplied, for the daughters had other proviſions, in prejudice of creditors. But the Court was of opinion, that the defective ſurrender ought to be ſupplied; but decreed the mortgagee his mortgage. There have been other caſes of this kind. There is one reaſon in the principal caſe that warrants me to do as I have done, and convinces me, that if I ſhould decree in any other manner I ſhould make ſuch a one as would not be reaſonable, and that is this, that if the wife had claimed the whole ſix hundred pounds a-year, without any

(*a*) 6. Bro. P. C. 132. 2. Freem. 292. Prec. Ch. 257. 3. Ch. Rep. 102.
(*b*)
(*c*) 2. Vern. 531. Eq. Abr. 340
(*d*)

conſideration

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conſideration or marriage proviſion, but ſolely by a defective execution of the power, it cannot be doubted but that the Court would have ſupplied it; and to ſay, becauſe ſhe claimed by a valuable conſideration in part, that ſhe ſhould not be entitled, whereas if ſhe claimed without any conſideration the whole ſhe would be entitled, this to me is ſtrange, and hardly reaſonable. Therefore I think, under theſe circumſtances, the caſe is ſtrong to ſupply the defective execution of this power. If there had appeared any kind of impoſition or ill practice by the wife, or any advantage taken of her huſband, that would have been proper for the conſideration of the Court, and might have had great weight to prevent the aiding of the execution of the power; but there is nothing of that kind in the preſent caſe. *Michael Harvey* the ſon's eſtate is charged no further than what might be done; for by the marriage of *Edward* the father himſelf, there was the like power to him to make a jointure upon the marriage of his ſon; and it brings it within the original intent and agreement, that this ſix hundred pounds a-year ought to be admitted by him as a reaſonable proviſion. *Lord Country's Caſe* (*a*) was much relied on as to the conſideration of the articles before marriage being valuable. But I do not know the Court ever carried into execution theſe articles; for the difficulty here was, that there was no execution of the power, not becauſe it was contracted for the ſettlement of the lands within the power, but the Court thought it was ſuch a lien upon the lands as they could decree the execution of the power.

I would conſider what is the operation of the declaratory clauſe in the laſt ſettlement; and I think this deed has introduced the incorrect execution of the power. It recites what had been before done, and declares, that this laſt deed was made to ſecure to the wife, after the deceaſe of the huſband, a jointure not exceeding ſix hundred pounds a-year, according to the power given to the huſband. The parties were willing to waive all the proceedings before, and the intent was, that the wife ſhould have this annuity.

And I am of opinion that ſhe ought; and therefore do decree, that the plaintiff is entitled to the jointure of ſix hundred pounds a-year out of the eſtate, according to the power by the ſettlement; and that ſo much of the lands and premiſes compriſed in the ſettlement of 1715 be allotted and ſet out accordingly.

This decree was afterwards affirmed, on a rehearing of the cauſe at *Lincoln's-Inn-Hall*, in the Vacation of *Trinity Term* 1739.

(*a*) Comy. Rep. 312. 1. Eq. Abr. 348. 9. Mod. 12. Gilb. Rep. 160. 10. Mod. 436.

Caſe 94.

Salt *againſt* Chambers (*a*).

Trinity Term, 13. & 14. *Geo.* 2.

If an eſtate is given to a father for the benefit of his children, to be paid them at twenty-one, and the father has no child, it ſhall remain in him for his own benefit abſolutely.

S. C. 2. Eq. Ab. 539.

WILLIAM CHAMBERS being poſſeſſed of a conſiderable eſtate, after having given, by the firſt part of his will, a handſome fortune for every one of his children, and declared that he had an equal affection for them all, and that his intention was to make their fortunes as equal as poſſible, deviſed the reſidue of his eſtate, which was very conſiderable, in the following manner, *viz.* "As to the reſt and reſidue of my perſonal eſtate, not hereby diſpoſed of, after payment of my ſaid legacies to my ſon *James Chambers*, and to my ſon *Thomas Chambers*, and to my daughters *Elizabeth Lawrance* and *Suſannah Roberts*, as aforeſaid, I give and bequeath the ſame, at the death of my ſaid wife *Anne Chambers*, to my two ſons and two daughters, to be equally divided among them: but my will is, that each of them pay ſuch his reſpective ſhare to and amongſt his reſpective children in general, whether they be ſons and daughters, &c. already born, or that ſhall hereafter be born, of my ſaid ſons and daughters, equally to be divided among them, ſhare and ſhare alike, as they ſhall reſpectively attain the age of twenty-one years, or be married, which ſhall firſt happen, and until ſuch time the ſame to be in the beſt manner put out at intereſt, and the ſame and the whole intereſt thereof be paid to and divided amongſt them, and no part thereof be applied to their maintenance or education, being a duty incumbent on their parents."

James Chambers, one of the ſons of *William Chambers*, the teſtator, died, having never had any children, and deviſed by his will the fourth part of this *reſiduum* to the plaintiff, who has brought his bill againſt the defendants for an account of *William Chambers*'s perſonal eſtate, and to be paid the fourth part of it, which he claims under the will of *James Chambers*, the ſon, who had never any child.

The queſtion is, Whether this fourth part of the *reſiduum* of *William Chambers*'s eſtate is ſo veſted in *James* as that he may, by his will, diſpoſe of it upon dying without iſſue? or, Whether it is to ſink into the eſtate of *William Chambers*, as an undiſpoſed part of the ſame?

The defendants inſiſt, that as by *William Chambers*'s will the four children had all diſtinct fortunes given them before, and as it is expreſsly ſaid in his will, that he had an equal affection for all his children, and was willing that their ſhares ſhould be equal, as to this *reſiduum* the children only are to be conſidered as truſtees for the grandchildren, and not to have the leaſt intereſt in it themſelves; and therefore as the teſtator *William* has not directed what ſhall be

(*a*) This caſe was tranſcribed from the manuſcript of Mr. Short. MS.

done

done with the fourth part, in caſe any of his children ſhould have no child, that as one of his children never had any child, it ought to be conſidered as a lapſed legacy, and reſult back to the teſtator's perſonal eſtate, and be divided amongſt the teſtator's neareſt relations, as if he had died inteſtate as to that part; and cite 1. *Vern.* 257. 23 *Feb.* 1729. *Mills v. Sharee.*

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The plaintiffs contend, that by theſe words in the will the reſidue of the teſtator's eſtate became veſted in the teſtator's four children, and they were to pay the ſame to their reſpective children, in caſe they had any; but if they had not, then the meaning of the will muſt be, that ſuch of the teſtator's children as happened to have no child ſhould retain his proportion of the reſidue of his father's eſtate, and that there are no words in the will that in any caſe diveſt the reſidue of the teſtator's perſonal eſtate out of the four children on their having no child; and there is no pretence for calling the ſhare which *James Chambers* was intitled to, as one of the teſtator's four children, a lapſed legacy or truſt; for it muſt be admitted, that the reſidue veſted in the children on the teſtator's death; and if they were to be truſtees, they were to be ſuch only for their children, and for their own benefit in caſe they had none; and that as *James Chambers* never had any iſſue, he had a power by his will to diſpoſe of the fourth part given to him: and ſuppoſe he had had iſſue, which afterwards died, it would not be contended but that fourth part would have belonged to him by taking out adminiſtration to his deceaſed children; and ſurely the fourth part of the reſidue of the perſonal eſtate was as much veſted in the teſtator's children in caſe they had no iſſue, as in caſe of iſſue it became veſted in the grandchildren: and therefore hope the plaintiffs, the truſtees of the will of *James Chambers*, are entitled to one-fourth of the reſidue of the perſonal eſtate of the teſtator *William Chambers* for the uſes mentioned in the will of *James Chambers*, and that this fourth part ſhall not be looked on as part of the teſtator *William*'s perſonal eſtate undiſpoſed of by his will. Cite 1. *Chan. Caſ.* 198. *Martin v. Douch.*

HARDWICKE, *Lord Chancellor.* It is manifeſt, that the teſtator *William Chambers* has diſpoſed of his whole eſtate. The defendants inſiſt upon making this event that has happened, of *James* dying without iſſue, a different ſenſe of the teſtator's, and that now as to *James*'s fourth he muſt be conſidered as dying inteſtate. But I think, the teſtator's intention of an inteſtacy as to part cannot be ſuppoſed.

As to the firſt part of his will, it is plain he intended to make all his children equal. By that then, as to the reſidue, he ſeems likewiſe to intend the ſame thing, for he gives it to his four children as tenants in common: but then ſays, he intends it ſhall be for the benefit of his grandchildren that are born, or that ſhall be born; and that it ſhall be put out at intereſt, and kept entirely for their benefit. This clauſe creates the difficulty. *James*, one of his ſons, never had a child, and deviſes his part of the *reſiduum* to the

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plaintiffs. The queſtion is, Whether, having no child, he is entitled to the fourth part of the eſtate himſelf? or, Whether it muſt be diſtributed as a lapſed legacy? And that will depend upon this queſtion, Whether *James* himſelf took any intereſt by the deviſe to him, or is to be conſidered only as a mere truſtee for his children, if any?

And I am of opinion, that *James* is not to be conſidered as a bare truſtee, but as a legatee of a fourth part of the *reſiduum* immediately veſted, but to depend on, and be void on, a contingency which has never happened. The teſtator ſays, the ſhare of the *reſiduum* ſhall be paid over to his grandchildren, born or to be born, at ſuch an age. Such of his grandchildren as were then born had an intereſt veſted in them immediately, and thoſe afterwards to be born would have their intereſt veſted as ſoon as born. As to thoſe children of the teſtator who had no child at the time of the deviſe, it muſt be conſidered as an immediate gift to them, to be paid over to their children, if they had any; if not, for their own benefit. This ſeems to be the plain conſtruction of the will, and agreeable to the declaration before made by the teſtator, that he intended to make all his children equal ſharers of his eſtate.

The teſtator afterwards ſays, "whereas I have diſpoſed of all my "perſonal eſtate as equal as I can." This ſhews, that he diſpoſed of the whole of his eſtate. He alſo conſidered the children of each child as a diſtinct ſtock, and not that all his grandchildren in general ſhould have an equal ſhare one with another, but that each ſon's and daughter's children ſhould have a ſeparate diviſion, to be equally divided among them.

Let us conſider now, where the intereſt of *James*'s ſhare is to go before any child is born. It could not be accumulated for the benefit of the grandchildren until there was a grandchild in being; and as long as no grandchild was born, nothing could be applied towards his maintenance, or be laid up for his benefit. In the mean time, it is to go abſolutely to *James* himſelf, and cannot be applied for the benefit of a grandchild until one is born; for until then, nothing is to veſt in him; it is given abſolutely to the children. And this ſhews, that the teſtator intended only to defeat the intereſt of his children for the benefit of his grandchildren; but if no grandchildren were ever born, then that it was to remain for the benefit of the children.

Therefore I declare, that the plaintiff is entitled to the fourth part of *William Chambers*'s reſiduary eſtate, and that the defendants do account for and pay him the ſame.

Robinſon

Robinſon *againſt* Cox.

Caſe 95.

Lincoln's-Inn-Hall, July 10, 1741.

A. (for many years a common whore) was kept by *B.* for ſome time, and then married *C. B.* continued his viſits to her, and gave her a note for 1000l. payable on demand. *B.* died, and now, upon a bill brought by his adminiſtratrix, this note was ſet aſide, it being entered into *ex turpi cauſâ*, and not as *præmium pudicitiæ*.

THIS was a bill by an adminiſtratrix to diſcover the conſideration of a note of one thouſand pounds given by *J. Robinſon*, her inteſtate, to *Mary*, the wife of the defendant *Cox*; and the bill alſo prayed to ſet the note aſide, and to be relieved againſt it.

THE CASE was this: The defendant, *Mary Cox*, had been, for many years, a common whore upon the town, and was kept by *Mr. Robinſon* the inteſtate for ſome years before her marriage. He allowed her a hundred pounds a-year, took her a houſe, and helped her to her huſband *Mr. Cox*. After the marriage, he continued his viſits as uſual, and never failed ſeeing *Mrs. Cox* once a-week; or if buſineſs or ſickneſs interpoſed, he always ſent a letter.

Mr. Robinſon often went out with *Mr. Cox* and his wife upon parties of pleaſure about town, and had often ſignified his intentions of leaving *Mrs. Cox* one thouſand pounds at his death; and at *Henly-upon-Thames Mr. Robinſon* entered into this note of one thouſand pounds payable to *Mrs. Cox* on demand for value received. *Mr. Robinſon* ſeveral days after this admitted he had entered into ſuch note, and ſhewed no diſlike to it (*a*).

HARDWICKE, *Lord Chancellor*. The doubt I had upon the beginning of this caſe was the defect of proof of the criminal converſation between *Mr. Robinſon* and the defendant *Mary Cox*; but upon hearing the depoſitions of *Mrs. Fuller*, who is mother to *Mary Cox*, I was fully ſatisfied of it; for as it ſtood upon the other evidence, there did not appear to be ſufficient preſumptive evidence of it, and in caſes of this nature there muſt be proof enough to induce one to preſume a criminal converſation; for ſuſpicion of ſuch a thing, how far ſoever it might ground my belief, it could not influence my judgment.

I ſhall now conſider the ſeveral points upon which the plaintiff has put her caſe in order for relief in this cauſe. THE FIRST is, that this note is a forged one, and not really given by *Mr. Robinſon*. THE SECOND, that if it is a true note, yet that it was obtained by fraud and impoſition. THE THIRD, that if the note was really given by *Mr. Robinſon* without any actual fraud or impoſition, yet, from the conſideration on which it was given, the Court will relieve againſt it.

AS TO THE FIRST POINT, Whether the note was really given? that is proper for a trial at law, and was tried collaterally in an action upon a bond brought by *Mr. Robinſon*'s adminiſtratrix againſt the defendant *Mary Cox*'s huſband, who pleaded this note

(*a*) 1. Vern. 483. 2. Vern. 287. 342. 2. Peer. Wms. 433.

Robinson against Cox.

by way of ſet-off againſt the demand ſet up by *Mr. Robinſon*'s adminiſtrator; upon which ſet-off this note was, and neceſſarily muſt be, proved to be a true one. But if the plaintiff had inſiſted upon a farther trial of the note being a real one, the Court would not refuſe her that juſtice; for it is proved to be given under very odd circumſtances. When there was a party of pleaſure to *Henly*, the huſband went out of the room; the wife went down for the pen and ink; the note was written by her from the inteſtate's dictating, and ſigned by him only; the words "*per me*" were written alſo by *Mrs. Cox*, which words the perſon who ſigns a note uſually does; and it is odd, that *Mr. Robinſon*, who is proved to be a man of ſenſe and buſineſs, ſhould not write a note of this conſequence himſelf. However ſuſpicious theſe circumſtances are, I muſt now take the note to be a good one, and ſigned by the inteſtate *Mr. Robinſon*.

As to THE SECOND POINT, Where the plaintiff prays relief upon the head of fraud and impoſition, I am of opinion, there is no ſufficient proof of that to relieve againſt this note; for though the note was given voluntarily, and at an inn, yet that is not ſufficient proof to preſume an impoſition upon *Mr. Robinſon*; and the rather, becauſe it is proved by *Mrs. Fuller*, that *Mr. Robinſon*, ſome days after he had given the note, told *Mrs. Fuller* that he had done ſo, and ordered the note to be brought down ſtairs, which was done accordingly, and he acknowledged that to be the note he had given. This therefore takes it out of the head of fraud and impoſition; though it ſeems very odd, that *Mr. Robinſon*, who intended to leave *Mrs. Cox* a thouſand pounds at his death, ſhould give a note for ſo much money payable immediately upon demand, and not after his death, and thereby make himſelf liable to pay it in all events, and perhaps, upon ſome diſguſt, to be thrown into priſon during his own life; and this done by a perſon who is proved to be a man of prudence and buſineſs. Odd as this is, it is not enough to induce this Court to relieve againſt this note upon the principle of fraud.

But the ground upon which I am of opinion to relieve againſt this note is, what the plaintiff has made THE THIRD PART of her equity, the *turpis cauſa*; and the reaſon why this Court relieves againſt notes and ſecurities entered into, where the conſideration is criminal, is from a general policy to deſtroy the credit of ſuch notes, and to diſcountenance the offence. The evidence as to the character of this woman is extremely ſtrong, and the Court can hardly have a ſtronger before it; for it is proved by multitudes, that ſhe had no other viſible methods of living but by entertaining gentlemen. It is proved, that ſhe applied to porters at taverns to ſend for her when any gentleman wanted a lady of the town; that ſhe was in the hoſpital for the worſt of diſtempers; and ſhe ſeems ſo ſenſible of the truth of this character, that ſhe does not offer any defence for herſelf, but rather confeſſes a life of proſtitution before her marriage, and down to that time; and her evidence goes only to her behaviour for the laſt five years after her marriage; and the mother

mother is not examined to prove the goodneſs of her character before. The mother indeed proves, that *Mr. Robinſon* before her marriage took her a houſe, and made her an allowance of no leſs than one hundred pounds a-year; which is evidence enough to me of his keeping her: ſo that ſhe is plainly proved to be a whore down to her marriage: and I am of opinion, that the ſame criminal commerce was continued between *Mrs. Cox* and *Mr. Robinſon* even after the marriage, and at the time of giving the note; for though ſhe is married to *Mr. Cox*, ſhe ſtill keeps up a correſpondence with her keeper, who viſits her once a-week, and if ſickneſs or buſineſs interrupted, he never failed to ſend a letter: he often went out with *Mr. Cox* and his wife upon little excurſions of pleaſure about town, and talked of coming to live in the ſame houſe: and thoſe are ſufficient teſtimonies to me to prove a criminal converſation after the marriage; for we muſt admit ſuch evidence as the nature of the thing will bear, and the evidence needs not to be ſo direct in the preſent caſe as in an action by a huſband for criminal converſation, or in a ſuit in the ſpiritual court for a divorce.

It is admitted, that there are many caſes where bonds entered into *ex turpi cauſâ* have been ſet aſide by this Court; but a diſtinction has been taken, that where ſuch a note or bond has been given to a woman who has been modeſt to the reſt of the world, and lain with none but the man who has given her ſuch note or bond, the Court will not relieve againſt ſuch bond, but will let it take its legal effect, and conſiders the money as a reward for the loſs of reputation, and as *præmium pudicitiæ*; but the manner of life of the defendant *Mrs. Cox* can by no means intitle her to the equity of this diſtinction.

Another diſtinction has been endeavoured at, that where a perſon of prudence, and with his eyes open, enters into a note to a woman of the town, that even there the Court will not relieve againſt it, though it is given *ex turpi cauſâ*; and there muſt be other favourable circumſtances in favour of the plaintiff who prays to be relieved, as where he is very young or dotingly old, and ſo worked and impoſed upon by the woman: but I do not know that any of the authorities have gone upon that diſtinction. In the caſe of the *Marquis of Annandale v. Harris* (*a*), it was admitted upon the argument, for I was of Counſel both here and in the houſe of lords, that if *Mrs. Harris* had been a lewd woman, or a common whore, there would have been relief againſt the ſecurity; but as ſhe was a modeſt woman until debauched, the Court decreed her the benefit thereof as *pretium pudoris*; and the late *Marquis* was neither a young gentleman nor a doting old one, but a very ſenſible ſhrewd man. And the ground wherefore the Court relieves againſt theſe ſecurities is from a preſumption, that as women of the town are

(*a*) 1. Eq. Abr. 31. 87. 3. Brown's Caſes in Parl. 445. 2. Peer. Wms. 432. —See alſo Cray *v.* Rook, Forreſter, 153.

full

Robinson *against* Cox.

full of deſign and artifices to impoſe upon people, that they therefore do make uſe of ſuch artifices, and are guilty of ſome fraud or impoſition, in getting ſuch notes; and this preſumption is made from general principles of policy, to diſcountenance the offence, and to deſtroy the credit of ſuch ſecurities; and therefore to prevent women of the town taking any advantage of their artifices, the Court ſays, ſuch a general preſumption ſhall run againſt them, that they may take no advantage of ſuch ſecurities (*a*).

(*a*) Prieſt *v.* Parrot, 2 Vezey, 160. Mathew *v.* Hanbury, 2. Vern. 187. Bainham *v.* Manning, 2. Vern. 242. Turner *v.* Vaughan, 2. Will. 339. Hill *v.* Spencer, Amb. 641. Cray *v.* Rook, Forreſter, 153. Walker *v.* Perkins, 3. Burr. 1568. Whaley *v.* Norton, 1. Vern. 483. Clerk *v.* Peram, 2. Atk. 333.

Caſe 96.

Man *againſt* Parkinſon.

Lincoln's-Inn-Hall, July 14, 1741.

Defendant was brought from *the Fleet* upon *alias pluries habeas corpus*, for his contempt in not putting in his anſwer; and it was now moved, that the bill might be taken *pro confeſſo*; and ſo ordered. Though THE LORD CHANCELLOR at firſt doubted, whether upon ſuch a perſonal contempt, as well as where a ſequeſtration goes againſt a perſon's eſtate for not putting in anſwer, it ſhould not be put into the paper.

THE DEFENDANT *Parkinſon* was brought up from THE FLEET upon an *alias pluries habeas corpus*; he having been committed for a contempt in not putting in an anſwer to the plaintiff's bill.

The plaintiff's Counſel now moved, that it might be taken *pro confeſſo*.

THE QUESTION was, Whether the bill upon a perſonal contempt could be taken *pro confeſſo* upon motion only? and, Whether it ſhould not be put down as a cauſe in the paper? as it muſt be where a ſequeſtration goes againſt a perſon's eſtate for not putting in an anſwer.

HARDWICKE, *Lord Chancellor*. This motion was made laſt Term, and I was in ſome doubt about granting it; for if the cauſe is put in the paper, the defendant will, by the rules of this Court, have a longer time to put in his anſwer, and the bill will not ſo ſoon be taken *pro confeſſo*; but the defendant will have better notice upon motion to have the bill taken *pro confeſſo* for a perſonal contempt, and here, than where the cauſe upon a ſequeſtration is put in the paper; for in caſe of a ſequeſtration, which is a proceſs againſt the eſtate, and not the perſon, of the defendant, there is no occaſion to give perſonal notice; for upon a return to the ſequeſtration of *nulla bona*, the cauſe is ordered to be put in the paper, and the clerk in court attending with the bill, it ſhall be read, and taken *pro confeſſo*, and there is no neceſſity of having the party in court; and this was ſettled in two caſes in my LORD NOTTINGHAM's time: but in this caſe of a perſonal contempt, where the plaintiff comes to move to have his bill taken *pro confeſſo*, the defendant will have better notice of the motion, for he muſt be brought up upon an *alias pluries habeas corpus* into court, and the clerk in court muſt attend with the record of the bill, which being read muſt then be taken *pro confeſſo*: and there is a precedent of this ſhewed to me in my LORD KING's time, in a cauſe wherein the

Earl

MAN *againſt* PARKINSON.

Earl of Lichfield and others were plaintiffs, and *Mr. Woolaſton* and others defendants; and the order granted upon the motion recites the ſeveral contempts, and that the defendant, being brought up by an *alias habeas corpus*, ſtill continued in contempt, and refuſed to put in an anſwer, and was thereupon remanded to THE FLEET; and at another day he was brought up again upon a *pluries habeas corpus*, and upon his ſtill perſiſting in contempt, and refuſing to file his anſwer, he was once more remanded; and laſtly brought up again by an *alias pluries habeas corpus*; and it being moved by the plaintiff's Counſel to have the bill taken *pro confeſſo*, and the Clerk in court attending with the bill, his Lordſhip ordered it to be taken *pro confeſſo*. The Regiſter alſo acquaints, that the practice has been ſo ever ſince this caſe of my *Lord Lichfield*.

WHEREFORE I AM OF OPINION, that the preſent bill is to be taken *pro confeſſo*.

The priſoner then ſaid, that he had his anſwer ready, and that it was ſwore to this morning.

Upon which THE CHANCELLOR ordered the anſwer to be filed, and the priſoner to be remanded to THE FLEET until he ſhould diſcharge his contempt.

Gibſon *againſt* Stiles. Caſe 97.

Lincoln's-Inn-Hall, July 18, 1741.

THE TESTATOR, *Haſkyn Styles*, being ſeiſed of ſeveral freehold and copyhold lands, mortgaged both for ſecuring the repayment of a large ſum of money, and accordingly ſurrenders were made of the copyhold eſtates to the mortgagee. *Haſkyn Styles* then made his will, and deviſed his manors, meſſuages, farms, lands, tenements, and hereditaments, to a truſtee, in truſt in the firſt place for the payment of his debts, and then in truſt to *A.* for life, remainder to *B.* in fee. The truſtee died in the life of the teſtator; whereupon, after the death of the teſtator, the lands deſcended to *D.* his heir at law, ſubject however to the truſts of the deviſe. And upon a bill brought by the creditors and by *A.* and *B.* againſt *D.* the heir at law, to have an execution of the truſts, the queſtion was, Whether, upon ſuch general words in a deviſe, copyhold lands would paſs? Caſe cited *Eq. Caſ. Abr.* 124. *Roſs v. Roſs*; and ſee *Eq. Abr.* 122. *pl.* 5. 2. *Vern.* 585. 600.

A. mortgages his freehold and copyhold eſtates, and ſurrenders the copyhold to the mortgagee; afterwards he makes his will, and deviſes his *manors, meſſuages, farms, lands, tenements, and hereditaments*, in truſt to pay debts, and after to *C.* for life, remainder to *D.* in fee, and dies. And THE LORD CHANCELLOR, on bill brought by the creditors and *C.* and *D.* ſeemed to think, that as the copyhold was not named in this deviſe, in caſe there ſhould be any ſurplus after debts paid, it would go to the heir at law; but reſerved this point; though he ſaid, deviſe by a mortgagor of *veſtuy que truſt* would be good without ſurrender of copyhold, becauſe ſuch ſurrender could not be had.—Forreſter's Rep. 78, 79. 1. Wms. 443, 444. Chan. Precedents, 37. 407.

HARDWICKE, *Lord Chancellor*. I have ſome doubt upon this deviſe, whether the copyholds paſs; for if they do, the heir at law will be diſinherited. It is clear, that if a man be ſeiſed of freehold lands, and of the legal eſtate of copyhold ones, and make a general

deviſe

Gibson *against* Stiles.

deviſe of "all his manors, meſſuages, &c." and make no ſurrender to the uſe of his will, the copyhold lands will not paſs (*a*). But it is ſaid, a ſurrender is out of the preſent caſe; for as the teſtator was only ſeiſed of an equity of redemption in the copyhold lands, and had no legal eſtate, it was out of his power to make a ſurrender: and I muſt admit, that it has been determined that where a perſon is only a *ceſtuy que truſt* of a copyhold, and the legal eſtate is in a truſtee; or where a perſon has only an equity of redemption of a copyhold, the eſtate at law being in the mortgagee; an expreſs deviſe of the copyhold eſtate by the *ceſtuy que truſt* or mortgagor will paſs the copyhold eſtate without a ſurrender, for that is impoſſible to be made; and ſuch a deviſe will bind a truſt or equitable intereſt. But this is neither of the caſes; for though *Mr. Haſkyn Styles* had only an equity of redemption in the copyhold, which might paſs by a deviſe, yet he has made no expreſs deviſe of it; but he only made a general deviſe of "all his manors, meſſuages, "&c." without any direct mention of copyhold lands. So that this is not very clear, whether the deviſor intended to include his copyhold eſtate, his freehold lands being ſufficient to ſatisfy the words of his will. But undoubtedly, in relation to creditors, the Court will make a ſufficient conſtruction to include the copyhold, if the freehold lands ſhould fall ſhort of ſatisfying them. But if there ſhould be a ſurplus of the copyhold eſtate after a diſcharge of the mortgage, the queſtion will be, Whether ſuch ſurplus ſhall go to *A.* and *B.* who are volunteers, in prejudice and diſheriſon of an heir at law? And I do not know any caſe where a copyhold eſtate has been conſtrued to be included in ſuch general words of a deviſe, where the queſtion has been between a volunteer and an heir at law. But this point muſt be reſerved.

(*a*) See Brunker *v.* Cook, 11. Mod. 128. Ibbot *v.* Cowling, 6. Term Rep. 63.

Caſe 98.

Chapman *againſt* Turner (*a*).

At the Rolls, February 26, 1738-9.

Joint adminiſtrators and executors muſt retain their debts rateably and in proportion to the aſſets.

A AND *B.* equal creditors by bond to *C.* who died inteſtate, took out a joint adminiſtration of his goods and effects, and poſſeſſed themſelves of what effects they could get into their hands.

A. poſſeſſed himſelf of ſufficient to pay his debt, but there was not enough left to pay *B.* his debt. Whereupon he brought his bill againſt *A.* the other adminiſtrator, to have him account for what he had received, and that both might be paid their reſpective debts in proportion to the aſſets left by the inteſtate.

THE QUESTION therefore was, Whether one adminiſtrator can retain for his own debt againſt another adminiſtrator, who has an equal right with him by virtue of the joint adminiſtration, and an equal demand by virtue of his bond?

(*a*) From Mr. Short's manuſcript.

It

CHAPMAN *againſt* TURNER.

It was agreed by all ſides, that there was not a caſe in any of the Books exactly in point to this. The higheſt to it is one in 1. *Ro. Abr.* 922. cited by MR. FAZAKERLEY, where there were two executors or adminiſtrators, and one paid a debt due from the inteſtate to another with his own money, for which he retained ſo much of the inteſtate's goods as amounted in the value to the debts paid, and then dies inteſtate. His adminiſtrator took poſſeſſion of theſe goods with the other of his inteſtate. Upon which the ſurviving executor brought an action of trover againſt the adminiſtrator of the deceaſed executor for theſe goods. But it was held, that the deceaſed executor might retain them for the debt which he paid of teſtator's; and therefore his adminiſtrator was well entitled to them by the adminiſtration, and might retain them againſt the ſurviving executors.

But VERNEY, *Maſter of the Rolls*, ſaid, that the executor did not take the goods as a retainer for the debt which he paid, but as a purchaſor of them for a valuable conſideration; for an adminiſtrator or executor cannot pay debts with the ſpecific goods or effects of a teſtator or inteſtate, but he muſt ſell theſe goods or effects, and pay the debt with the money ariſing from ſuch ſale. Therefore if an adminiſtrator pay a debt of the inteſtate's, and take goods, &c. to the amount of that debt, he is to be looked upon as a purchaſer of thoſe goods for a valuable conſideration, and ſo his executor or adminiſtrator will be entitled to ſuch goods in the ſame manner as to any other of the teſtator's or inteſtate's goods.

AND IT WAS ORDERED, That an account ſhould be taken of the inteſtate's effects, and that both *A.* and *B.* ſhould be paid their debts rateably and proportionably to the aſſets left by the inteſtate.

Partridge *againſt* Partridge (*a*). Caſe 99.

Michaelmas Term, 10. *Geo.* 2. 1736.

THE plaintiff's huſband, by his will, dated the third of *Auguſt* 1720, gave her the intereſt and dividends of one thouſand pounds *South-Sea* ſtock for life, and gave the reſidue of his eſtate to his younger children. The teſtator at the making his will had one thouſand eight hundred pounds *South-Sea* ſtock, but before *Midſummer* 1733 ſold out all of it, except two hundred pounds, and bought in more again, by which it was reduced to ſixteen hundred pounds; and by an act, 6. *Geo.* 2. enacting, that the ſhare of every *South-Sea* proprietor ſhould be divided into four equal parts, three of which were converted into *South-Sea* annuities, and the other fourth to remain ſtock, the ſame was reduced to four hundred pounds, out of which another legacy of one hundred pounds *South-Sea* ſtock being deducted, there remained now but three hundred pounds to anſwer the legacy of one thouſand pounds.

The plaintiff brought her bill againſt the executors and younger children for the benefit of this deviſe; and upon the hearing,

If a perſon has 1300l. ſtock in the funds, and deviſes 1000l. of it, and afterwards ſells 1600l. and then buys 1400l. and between the making of the will and the teſtator's death the Legiſlature changes that kind of ſtock into annuities, theſe circumſtances make no alteration in the legacy.

S. C. 2 Eq. Ab. 570.

S. C. Talb. 226.

(*a*) From MR. SHORT's MS.

MR.

PARTRIDGE *againſt* PARTRIDGE.

MR. RYDER, *the Solicitor-General*, inſiſted *for the defendants*, that the deviſe of one thouſand pounds *South-Sea* ſtock was a ſpecific legacy (*a*); and the teſtator, after making his will, having ſold all his *South-Sea* ſtock except two hundred pounds, though he afterwards bought in more, this was a revocation of his intention *pro tanto*; and cited *Aſhton v. Aſhton (b)*, at THE ROLLS, which was affirmed by THE CHANCELLOR. That if this ſhould not be a revocation of the legacy, yet the teſtator having only four hundred pounds *South-Sea* ſtock in his name at his death, and having given another legacy of one hundred pounds *South-Sea* ſtock to his wife, there remained only three hundred pounds to anſwer the legacy of one thouſand pounds; and it being a ſpecific deviſe, the deficiency ought not to be made good out of any other part of the teſtator's eſtate.

TALBOT, *Lord Chancellor*. The deviſe of one thouſand pounds *South-Sea* ſtock is rather deſcriptive than ſpecific; and as the teſtator had, at the time of making his will, ſufficient *South-Sea* ſtock to anſwer this deviſe, he ſelling it out afterwards, to anſwer ſome particular occaſions of his own, ought not to be conſtrued an ademption of the legacy, or any alteration of his intent in regard thereto (*c*). And if the ſelling out the ſtock could by any means be taken to be an alteration, ſo that his wife ſhould not have the benefit of this deviſe, his afterwards buying in a further ſufficient quantity of ſtock was as ſtrong an indication that ſhe ſhould have the benefit of this deviſe, as his ſelling of it out before was that ſhe ſhould not. As to the act of parliament, it was the act of the Legiſlature, to which the teſtator was no way concurring, and therefore could not make any alteration in his intention (*d*).

And therefore decreed, that the widow ſhould ſtand in the ſame place, with reſpect to this one thouſand pounds *South-Sea* ſtock, as the teſtator would have done if he had been living; and decreed, that the widow ſhould have two hundred and fifty pounds *South-Sea* ſtock and ſeven hundred and fifty pounds *South-Sea* annuities, to ſtand in the name of the executors, and they to execute a declaration of truſt of it according to the will.

(*a*) See Hinton *v.* Pinck, 1. Peer. Wms. 540. Purſe *v.* Snaplin, 1. Atk. 414. Aſhburner *v.* Macguire, 2. Brown. C. C. 109.

(*b*) Caſes T. T. 152. S. C. 3. Peer. Wms. 184.

(*c*) Hambling *v.* Liſter, Ambl. 402.

(*d*) See Bronſdon *v.* Winter, Ambl. 57.

Caſe 100.

Northey *againſt* Northey.

In Chancery, November 10, 1740.

Parties to a bill. 8. C. 2. Atk. 77.

A DEVISES his wife's *paraphernalia* to his two daughters, and makes *B.* his executor. The wife files her bill againſt the executor alone for her *paraphernalia*, without making the two daughters defendants.

HARDWICKE, *Lord Chancellor*. This queſtion concerns only part of the will; and if you expect a decree for this particular part, you muſt have the legatees before the Court. The huſband gives theſe *paraphernalia* as a ſpecific legacy, and the daughters and wife both

both claim in part from the ſame perſon, and therefore all the claimants muſt be before the Court. The wife might have brought *trover* for them againſt the executor alone; but here both the legal and truſt or equitable part is brought in queſtion; and this Court will conſider the executor as a truſtee for the ſpecific legacy. NORTHEY *againſt* NORTHEY.

Ordered that the plaintiff amend her bill.

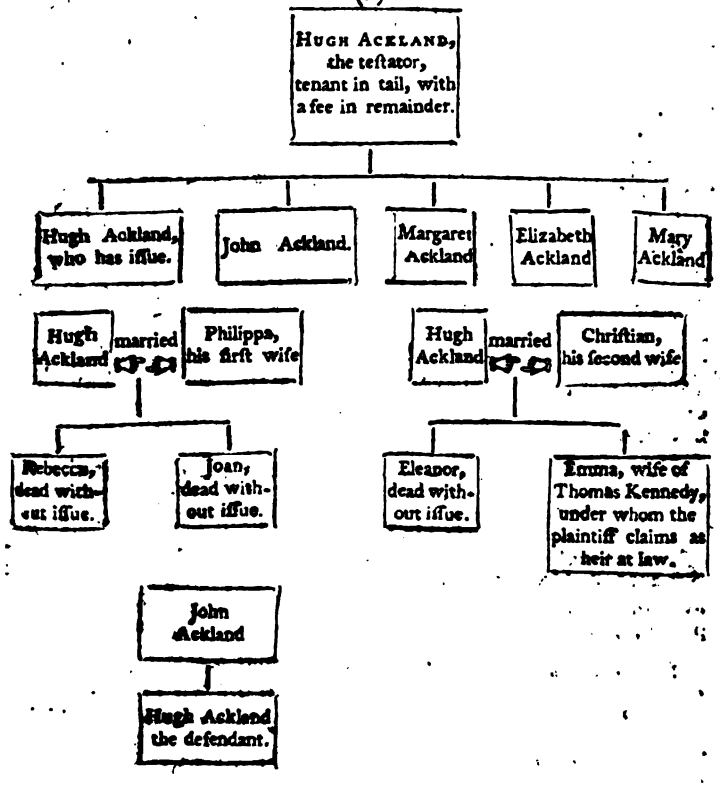
Kennedy *againſt* Ackland (*a*). Caſe 101.

Hilary Term, 13. *Geo.* 2. 1739.

HUGH ACKLAND, the father, being tenant in tail of the lands in queſtion, with the fee-ſimple expectant, deviſed them to his ſon *Hugh Ackland*, and died, leaving iſſue two ſons, *Hugh* and *John*, and three daughters, *Margaret*, *Elizabeth*, and *Mary*, who all died without iſſue. *Hugh Ackland*, ſon of *Hugh* the teſtator, being thus ſeiſed, married his firſt wife *Philippa*, on whom the lands were ſettled in ſpecial tail, and *Hugh*, by that ſettlement, was tenant in tail with the fee expectant upon failure of iſſue. *Hugh*, by *Philippa* his firſt wife, had iſſue two daughters, *Rebecca* and *Joan*, and by *Chriſtian* his ſecond wife two more, *Eleanor* and *Emma*. *John*, the ſecond ſon, had iſſue *Hugh Ackland*, the preſent defendant, and is dead (*b*).

(*a*) This caſe was tranſcribed from the manuſcript of MR. SHORT.

(*b*)



KENNEDY against ACKLAND.

Hugh Ackland, ſon of the firſt teſtator *Hugh*, died, leaving iſſue four daughters. The eſtate which was created by the marriage-ſettlement with the firſt wife *Philippa*, deſcended on the firſt two daughters of that marriage, there being no ſon; but the reverſion in fee fell on all the four daughters equally, they being all related in equal degree to the common anceſtor, *Hugh Ackland*.

And it is upon this deſcent of the fee that the preſent queſtion ariſes.

Joan and *Rebecca* died without iſſue, or without docking the intail; as alſo did *Eleanor*, one of the daughters by the ſecond wife *Chriſtian*.

Emma, being thus left the only ſurviving daughter, intermarried with *Thomas Kennedy*, who is ſince dead, leaving his brother, *William Kennedy*, his heir at law; and as ſuch he claims the eſtate in queſtion.

Emma, the wife of *Thomas Kennedy*, upon her marriage with him levied a fine, &c. to the uſes of that marriage, &c.

The defendant *Hugh Ackland* claims as ſon and heir to *John Ackland*, brother to *Hugh Ackland* the ſecond, and heir at law to *Rebecca* and *Joan*, on whom, he ſays, the moiety of the fee deſcended after the death of their father *Hugh Ackland* the ſecond; for being of the whole blood to them, as their uncle, he will be entitled to ſuch moiety, if it did ſo deſcend on them, before their half-ſiſters *Eleanor* and *Emma*.

The plaintiff, *William Kennedy*, claims as heir at law to *Thomas Kennedy*, his brother, who married *Emma*, on whom he inſiſts the whole fee deſcended after the death of *Rebecca*, *Joan*, and *Eleanor*, as heir at law to *Hugh Ackland* the ſecond, who was the laſt perſon actually ſeiſed of the freehold.

The queſtion was, Whether, as the eſtate-tail is ſpent in *Joan* and *Rebecca*, by their dying without iſſue and not having docked the intail and moiety of the fee ſo deſcended on the ſaid *Joan* and *Rebecca* as to make *John*, their uncle and heir-general, take their moiety by deſcent? or, Whether, as *Hugh Ackland* the ſecond was the perſon laſt actually ſeiſed of the freehold and inheritance, *Rebecca* and *Joan* not having docked the intail, the two daughters by the ſecond venter, *Eleanor* and *Emma*, after the death of their ſiſters, took the whole reverſion in fee as heirs to him?

HARDWICKE, *Lord Chancellor*, was of opinion, that the tail was ſpent in *Joan* and *Rebecca* by their dying without iſſue, and that a moiety of the fee did not deſcend on them, ſo as to entitle *John Ackland*, their uncle and heir at law, to it after their death: but that as *Hugh Ackland* the ſecond was the perſon laſt actually ſeiſed of the freehold and inheritance, *Emma*, his daughter by the ſecond wife, will be entitled to the whole fee, as heir to her father and ſiſter *Eleanor*; and from her huſband *Thomas*, the plaintiff *William Kennedy* will have a good title as his heir at law.

N. B. MR. FAZAKERLEY is of a contrary opinion, and thinks, that a moiety of the fee deſcended on *Rebecca* and *Joan*, and from them *Hugh*, the defendant, is entitled to their moiety.

The Lord Mayor and the Aldermen of York *againſt* Sir Lionel Pilkinton and Others.

Caſe 102.

In Chancery, Eaſter Term, 15. Geo. 2. 1742.

THE PLAINTIFFS brought their bill againſt the defendants for an excluſive right to fiſh in the *River Ouſe*, in *Yorkſhire*, and to be quieted in the poſſeſſion of ſuch fiſhery, to prevent multiplicity of actions.

The plaintiffs claiming an excluſive right of fiſhery, brought their bill to be quieted in the poſſeſſion of it, and to prevent multiplicity of actions. The defendants by anſwer inſiſt on a cuſtom they have of fiſhing on the borders of their land. Pending the ſuit, plaintiffs ind.ct ſeveral perſons in the court of ſeſſions for the city of *York* for fiſhing under an authority from defendants. And now, upon affidavit that the mayor and aldermen, plaintiffs, are in commiſſion of the peace for *York*, and conſequently would be judges of their own caſe, defendants moved for an injunction to ſtay proceedings on theſe indictments.

The defendants by anſwer inſiſt, that they are lords of ſeveral manors, and of very large eſtates along the banks of the *River Ouſe*, and that they have always uſed to fiſh in ſuch parts of the river as are contiguous to their land.

The plaintiffs, pending this ſuit, indicted ſeveral perſons in THE COURT OF SESSIONS for the city of *York*, for fiſhing in the river under an authority from the defendants.

The defendants now moved for *an injunction* to ſtay proceedings upon theſe indictments, upon an affidavit that the mayor and aldermen, who are plaintiffs in the cauſe, are in the commiſſion of the peace for the city of *York*, and conſequently would be judges in their own caſe.

MR. ATTORNEY-GENERAL oppoſed the motion by denying the juriſdiction of this Court to ſtay proceedings in pleas of the crown, although the queſtion depends upon a matter of right which is ſubmitted to the determination of this Court.

MR. BROWN replied, that it was very extraordinary that the plaintiffs, who come to eſtabliſh their excluſive right of fiſhing by bill in this Court, ſhould, when the thing is ripe for hearing, take this other method of proceeding by indictment, which in ſome meaſure will try the very right; for the defendants to ſuch indictments cannot be guilty of the treſpaſs, if the perſons who authoriſed them had a right to fiſh. Beſides, as they have brought their bill in this Court, and have ſubmitted their title, they have concluded themſelves from proceeding in any other court or method; and if they do, this Court will grant an injunction.

LORD CHANCELLOR. Though this Court cannot grant an injunction to ſtay a criminal proceeding at the ſuit of the crown, ſo as to reſtrain the attorney-general, yet as this is an indict-

HARDWICKE, *Lord Chancellor*. Where criminal proceedings relate to matters left to the determination of this Court, I ſhould not heſitate to ſtay proceedings; and this Court has often done it. An information was brought in the name of the attorney-general, in order to ſettle a right in a highway; and upon motion, there was an order of this Court to ſtay the proceedings in an indictment for a repair of the highway in the ſeſſions until ſuch information was determined in this Court. Suppoſe a right to the boundaries of a manor was diſputed in this Court, and there was an injunction to ſtay proceedings in an action of treſpaſs, and the party ſhould change his action of treſpaſs to an indictment of treſpaſs, I ſhould have no ſcruple to ſtay his proceeding.

ment for treſpaſs in which was no violence, and is to try a civil right, which is the ſubject of an action, it can order the proſecutor, who is plaintiff now before the Court, not to proceed.—S. C. 2. Atk. 282.

LORD-MAYOR OF YORK AND THE ALDERMEN *againſt* SIR LIONEL PILKINTON AND OTHERS.

His Lordſhip was now obliged to go to the houſe of lords, and ordered this motion to ſtand over until the next day, when he ſpoke to this effect:

The defendants in this cauſe had another method of gaining what they attempt by this motion. If they had gone to the attorney-general, and had ſhewed him, that the indictment was not for any violence or breach of the peace, but was the diſpute of a civil right, and the proper ſubject of an action of treſpaſs to try that right, he to be ſure would have granted a *ceſſet proceſſus* or *nolle proſequi* almoſt of courſe, eſpecially where one of the parties whoſe right was involved in the ſubſtance of the indictment was to be judge of the indictment.

But as the parties have prayed for their remedy in this court by motion, we muſt ſee how far we can aſſiſt them. This proceeding of the plaintiffs by way of indictment is improper upon two accounts: In THE FIRST place, they are making themſelves their own judges; and in THE SECOND, they are in ſome meaſure going to the deciſion of a right which they themſelves have ſubmitted to the decree of this Court. Beſides, as the prayer of the plaintiffs bill is to prevent multiplicity of actions, they are acting quite inconſiſtently with what they pray; and the queſtion will be, Whether this Court can ſtay theſe proceedings, which are not actions in the name of *the party*, but a proſecution in the name of *the king* for a breach of the peace? And to be ſure this Court has not ſuch a general juriſdiction as to grant injunctions to ſtay criminal proceedings which are at the ſuit of the crown, for the attorney-general may ſtill proceed. But where a matter of property is laid before this Court for its judgment, and the plaintiff in the cauſe indicts the defendant for a treſpaſs upon the land, without any violence or breach of the peace, which treſpaſs might now properly be the ſubject of an action, it being attended with no marks of violence, and is to try a civil right; there the Court, though it cannot grant a formal injunction to cloſe the hands of the attorney-general, yet it can and will make an order on the proſecutor, who is party to a bill in this Court, not to proſecute: and that is the very caſe before the Court; for it is ſworn, that the indictment found at the ſeſſions is merely for fiſhing, without any circumſtances of miſbehaviour which tend to a breach of the peace; and the queſtion upon ſuch indictment can only be upon the civil right, which is the ſubject of an action, and is already before this Court, which will make an order on the proſecutor, who is a party to a ſuit for the ſame thing in this court, not to proceed on the indictment until his right is at in at period his court. As ſuppoſe a bill here to ſettle the right of lands, and there are ſeveral entries, and indictments brought by ſome of the parties for thoſe forcible entries, which indictment is a remedy by act of parliament for breach of the peace, and alſo a civil remedy for the benefit of the party, yet the Court will ſtay the party from proceeding in this indictment for his own benefit until his right to the lands in the bill is determined in this court.

Therefore

Therefore let there be an order on the plaintiff to ſtay him from proſecuting the defendants or their agents, either by way of action or indictment, for exerciſing the right of fiſhing claimed by the defendants in their anſwer; until the hearing of the cauſe or further order.

LORD-MAYOR OF YORK AND THE ALDERMEN *againſt* SIR LIONEL PILKINTON AND OTHERS.

Caſe 103.

Lockwood and Others *againſt* Ewer and Others;

OR,

Lady Child and Others *againſt* Chanſtilet.

In Chancery, Eaſter Term, 15. Geo. 2. 1742.

THIS was a bill brought by the repreſentatives of *Sir Thomas Coke* againſt the repreſentatives of *Mr. Ewer*, in order to have a redemption of two thouſand five hundred pounds *Eaſt India* ſtock, upon the payment of what ſhould appear to be due for principal and intereſt on an original loan of two thouſand pounds, for which the ſaid two thouſand five hundred pounds *Eaſt-India* ſtock was mortgaged to *Mr. Ewer*.

In the year 1708 *A.* borrows of *B.* 2000l. and for ſecurity aſſigns to *B.* 2500l. *Eaſt-India* ſtock, and gave his bond for the ſame ſum payable *July* following; *B.* ſigns a defeaſance, by which he covenants, that if *A.* paid principal and intereſt in *July* he would re-tranſfer. The ſtock ſinking in value, ſeveral calls were made, which *B.* paid, and upon the laſt call *B.* had paid 24l. over and above the 2500l.; and the ſtock afterwards increaſed in its value. *B.* continues in poſſeſſion until the year 1715, and then ſells out this 2500l. ſtock, and united it to other ſtock of his own, and died; and in 1720 a bill is brought to redeem, but was diſmiſſed on account of the length of time; and this being a perſonal pledge, 2. Atk. 303.

THE CASE was thus: In the year 1708 *Sir Thomas Coke*, being governor of the *Old Eaſt-India Company*, and having occaſion to borrow two thouſand pounds, but not thinking it diſcreet that the Company ſhould be acquainted with his want of money, applied himſelf to *Mr. Walters*, in whoſe name, as the bill charges, part of his ſtock ſtood, and deſired him to borrow this ſum of *Ewer* as of his own proper account; which *Mr. Walters* accordingly did, and for ſecurity aſſigned to *Mr. Ewer* two thouſand five hundred pounds *Eaſt-India* ſtock, and alſo gave his own bond for the payment of the money in *July* following. *Mr. Ewer* on his part, at the ſame time, by his deed-poll of defeaſance, obliged himſelf to re-transfer the two thouſand five hundred pounds upon payment of the principal and intereſt by *July* next; and at the ſame time, as the bill charges, *Sir Thomas Coke* gave to *Mr. Walters* a bond of indemnity for the bond he had given on his account; but there was no proof of this in the cauſe. Afterwards, in the ſame year, the ſtock belonging to that Company ſunk in its value; they made ſeveral calls upon the proprietors by reaſon of their wanting money, and *Ewer* paid near fifty pounds *per cent.* on account of theſe calls for the ſtock of two thouſand five hundred pounds, which was ſo tranſferred to him; inſomuch that, upon paying the laſt call, there was twenty-four pounds ten ſhillings due to *Mr. Ewer* above the two thouſand five hundred pounds *Eaſt-India* ſtock. In 1709 the *Old* and *New Eaſt-India Companies* were united, and by that means the credit of their ſtock increaſed. After that, in the ſame year, *Sir Thomas Coke* died, and left *Lady Coke* his executrix, who made no propoſals for any redemption, but *Mr. Ewer* continued in the quiet receipt of the dividends until 1715, when he died; but before that time he had ſold out this two thouſand five hundred pounds, and united it with his own groſs ſtock of about fourteen thouſand

there was no occaſion to foreclose.—S. C.

LOCKWOOD AND OTHERS *againſt* EWER AND OTHERS; OR, LADY CHILD AND OTHERS *againſt* CHANSTILET.

pounds. In the year 1719 *Lady Coke* died, making *Mr. Lockwood* her executor, who, in a few years after he had diſcovered that this equity of redemption was in truſt for *Sir Thomas*, brought his bill, *viz.* in the year 1729. *Mr. Walters* alſo died, but at what time is not very certain. His repreſentatives however, who were made defendants in this cauſe, admitted, that what *Mr. Walters* did was done as truſtee for *Sir Thomas Coke*.

And the queſtion upon this caſe was, Whether the repreſentatives of *Sir Thomas Coke*, who are plaintiffs, ſhould be admitted to a redemption of this *Eaſt-India* ſtock, which was mortgaged in 1708, and this bill not filed until 1729, which is above twenty years? and, Whether they ſhould not be admitted to a redemption, notwithſtanding the length of time, as there was no bill for a foreclоſure?

IT WAS ARGUED *for the plaintiffs* to this effect, by NOEL, WELDON, WALLER, and MURRAY.—This whole tranſaction was of a private nature, and carried on in the name of a third perſon. *Sir Thomas Coke* died in one year after the mortgage, and made *Lady Coke* his executrix; but ſhe did not ever diſcover that the equity of redemption of this ſtock belonged to *Sir Thomas Coke*, although ſhe lived until 1719. After her death her repreſentative, *Mr. Lockwood*, diſcovered the truſt, and in a few years afterwards filed his bill, *viz.* in 1729; ſo that the account of time which is to run againſt a redemption is only to be taken from the time of the diſcovery, and not from the time of the mortgage made, and then the bill will be brought in a proper time for a redemption. The Court will not admit time to run againſt an infant; and the plaintiffs ought to have the ſame privilege, for it was not poſſible for them to bring a bill for redemption of what they did not know belonged to them: before they ought to be precluded from a redemption, *Mr. Ewer* ought to have foreclоſed the equity of redemption.

Redemption of mortgages ſubject to ſtatute of Limitations for making entries and bringing ejectments; but where mortgagee enters and holds until the mortgage is ſatisfied, as in *Welſh* mortgages, there no time bars the mortgagor's redemption.

1. Vern. 418.
2. Vern. 481.

It has been often mentioned in this court, that the *ſtatute of Limitations*, as to making entries and bringing ejectments, is the rule the Court directs itſelf by in the redemption of mortgages. But that is not the only rule; for the particular circumſtances of a caſe are alſo to be taken into the account, as appears in two caſes in *Vernon*. The firſt is that of *Orde v. Heming (a)*, where a bill was to redeem a mortgage; and the defendant demurred by reaſon of the plaintiff's own ſhewing, for it appeared the mortgage was ſixty years old; but the demurrer upon argument was over-ruled, becauſe it was charged in the bill, that the mortgagor agreed that the mortgagee ſhould enter and hold until he was ſatisfied, which is in the nature of a *Welſh* mortgage; and in ſuch caſe the length of time is no objection. The ſecond caſe is *Proctor v. Cowper (b)*: The bill was filed in 1700 to redeem a mortgage made in 1642; the mort-

(*a*) 1. Vern. 418. 2. Vern. 481. 1. Eq. Abr. 314.

(*b*) 1. Eq. Abr. 314. 2. Vern. 377. 2. Eq. Abr. 611. Prec. in Chan. 116.

gagee

gagee entered in 1650; there were three deſcents on the part of the defendant, and four on the part of the plaintiff; yet the length of time being anſwered for the greateſt part of the time by infancy or coverture, and foraſmuch as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up by the mortgagee, the Court decreed a redemption, and an account from the foot of the account in 1686. As to the length of time, this caſe differed from the redemption of lands, where the profits and outgoings being uncertain, and the mortgagee having entered and been in poſſeſſion ſeveral years, and conſidered the eſtate as his own, perhaps he may have made ſuch improvements, and have met with ſuch accidents from bad tenants and repairs, as it would be very difficult for him to give a regular account of: but in the preſent caſe it is otherwiſe; for in the caſe of *Eaſt-India* ſtock the mortgagee can have been at no expence or improvements, and the account will be taken without any ſort of difficulty or prejudice to the mortgagee; for he has only on one ſide of the account to charge the mortgagor with the principal and intereſt for ſo many years, and on the other ſide of the account to give him credit for ſo much as he ſhall have received upon the dividends of the *Eaſt-India* ſtock, which he will eaſily collect from the Company's books, which are things of a public concern, and lie open to every proprietor of ſtock.

Eaſt-India ſtock is a ſpecies of perſonal property which has aroſe within leſs than a century, and makes an annual profit, and ſo differs from any other dead perſonal thing which lies in the hands of the pawnee without any profit ariſing from it, as jewels, plate, &c.; and this will make a difference as to the redemption; for a Court will lean againſt the redemption of ſuch a dead piece of perſonalty when it has lain in the hands of a pawnee for any length of time; but it will be otherwiſe of *Eaſt-India* ſtock, becauſe that is annually paying a ſort of intereſt to the pawnee.

In the caſe of a rent-charge, this Court had redeemed after eighty years time; and they took a difference between a redemption of a rent-charge and of land *(a)*.

MR. ATTORNEY-GENERAL *for the defendants.* This tranſaction was in 1708, and *Mr. Ewer* lived after this mortgage until 1715, and his repreſentatives had no demand at all upon him for any account of the two thouſand five hundred pounds *Eaſt-India* ſtock, and therefore imagined all demands for a redemption to be at an end: nay, *Mr. Ewer* conſidered it in this light himſelf, for he ſold it out, and united it with his groſs ſtock.

But ſuppoſing this *Eaſt-India* ſtock to be redeemable, it is not redeemable by *Sir Thomas Coke*'s repreſentatives, the preſent plaintiffs, for the bond of *Mr. Walters* is produced, and the tranſfer of the ſtock from *Mr. Walters*, and the defeaſance of *Mr. Ewer* to *Mr. Walters*; but there is no evidence in the world that

(*a*) Floyer v. Lavington, 1. Peer. Wms. 270.

LOCKWOOD AND OTHERS *againſt* EWER AND OTHERS; OR, LADY CHILD AND OTHERS *againſt* CHANSTILET.

this was a mortgage from *Sir Thomas Coke* by *Mr. Walters* as his truſtee; and therefore *Sir Thomas Coke*'s repreſentatives cannot redeem, for the tranſaction being in *Mr. Walters*' name, it muſt be taken to be his ſtock; and the plaintiffs ought to have ſhewed ſome deed of truſt from *Mr. Walters* to *Sir Thomas Coke* of this ſtock, and that there was a tranſfer of it from *Sir Thomas* to *Mr. Walters*; which they have not done: the only evidence is, the admiſſion of the executors of *Mr. Walters* in their anſwer to ſtand as truſtees for *Sir Thomas*'s repreſentatives for the ſtock; but that will be no evidence againſt us; for though it may bar *Mr. Walters*' executors from any claim which they may make againſt us, yet it cannot give a right to *Sir Thomas*'s repreſentatives to ſet up any claim of redemption againſt us.

On pledges of perſonal things, if the pledger does not redeem them at the day, the pawnee may ſell them without a decree to foreclose.

Mr. Ewer had a right to ſell this *Eaſt-India* ſtock as ſoon as ever it was forfeited by the non-payment of the principal and intereſt on the day fixed for it. The common known principle upon pledges of perſonal things is, that if the pledger do not redeem them at the day, the pawnee may ſell them without any previous decree for a foreclosure. This caſe differs from that of a rent-charge, which is a real thing, and is as fixed and ſubſtantial as the land itſelf; and in the caſe of *Floyer v. Lavington*, in which the caſe of *Widdrington v. Jennings* is cited, the Court denied a redemption of a rent-charge after ſixty years, almoſt purely for the length of time; and LORD HARCOURT ſaid, the Court had already gone too far in permitting redemptions.

It is very inconvenient that theſe perſonal things ſhould be always looked upon as redeemable, for length of time carries with it a preſumption that *Mr. Ewer* was a purchaſer of the equity of redemption of this ſtock from *Mr. Walters* or *Sir Thomas Coke* the *ceſtuy que truſt*; and though there would be no difficulty in taking the account of ſtock and its dividends, yet that is not the preſumption the Court goes upon in the redemption of mortgages, for it is that property may be quieted; and there is a period of time when the party muſt aſſert his right; and the ſame length of time ſhall bar a redemption in equity as bars an entry by ſtatute.

HARDWICKE, *Lord Chancellor*. I am of opinion, that this bill ought to be diſmiſſed; for it would be very miſchievous if this cauſe was permitted to proceed. If this had been land which had been mortgaged, the defendants could not have held it irredeemable without coming into this court for a foreclosure; but the thing pledged in the preſent caſe is not land, but perſonalty, *viz. Eaſt-India* ſtock; and it has been determined, that in ſuch caſe the party has no occaſion to come into this court for a foreclosure. That point was ſo ſettled in the caſe of *Tucker v. Wilſon* (*a*), which was thus: One poſſeſſed of an exchequer-annuity for ninety-nine years borrowed money upon it, and for ſecurity there was an abſolute tranſfer of the annuity, but with a diſfeaſance that if the money was

In caſe of perſonalty, no occaſion to foreclose.

1. Peer. Wms. 261.

(*a*) 1. Peer. Wms. 261.

paid

paid at ſuch a day the aſſignment ſhould be void; the money was not paid at the day; upon which the lender frequently deſired the money, and gave notice that he would ſell; and appointing a time for the purpoſe, deſired the borrower to be preſent to ſee that the annuity was ſold at the full value: the borrower, by letter, deſired the lender to ſtay a week longer before he ſold, which was alſo complied with; and then the lender dying ſuddenly, the defendant, his adminiſtrator, ſold the annuity at *the Exchange* by a ſworn broker for the full value that thoſe annuities then ſold for, and which was leſs than what the money due to the defendant amounted to: theſe annuities afterwards roſe in value; whereupon the mortgagor brought a bill to redeem, or to compel the defendant to purchaſe another annuity on the ſame fund, and of the ſame yearly value, to be transferred to the mortgagor on his payment of principal and intereſt: and HARCOURT, *Lord Chancellor*, ſaid, Here is no expreſs power to ſell; and annuities for ninety-nine years are like rent-charges out of lands, and not like ſtocks, which may be thought to be of imaginary value; and there being no decree for foreclоſing the mortgagor, nor any agreement in writing that the mortgagee ſhould ſell, let the defendant procure an annuity of the like value, and upon the ſame fund, to be conveyed to the plaintiff, upon his payment of the principal and intereſt to the defendant; and let the maſter compute what is due for principal and intereſt: from which decree an appeal was brought in the houſe of peers, where it was inſiſted, that theſe exchequer-annuities, as well as ſtocks, were equally ſold at *the Exchange*, and that this was but as a pawn; and though there was no expreſs power to ſell in the defeaſance, yet by the mortgagor's letters it was plainly ſubmitted to, when the mortgagor deſired the ſale might be deferred for a week; that the convenience of theſe ſecurities among merchants was, that after the day of payment was paſſed they were taken to be ready money; and that it would be infinitely troubleſome and dilatory if there could be no ſale of ſuch annuity thus pledged without a decree of foreclоſure; that this would ſet aſide ſeveral ſales that had been made in the like caſes, and occaſion multiplicity of ſuits; wherefore the decree was reverſed by the lords, *nemine contradicente*. In the preſent caſe, the plaintiff can be in no better condition than *Walters* himſelf would have been if he had been plaintiff; for no proof has been made any otherwiſe than as it ariſes from an admiſſion in the anſwer of *Walters*' executors, that he is barely a truſtee for the benefit of the plaintiff; and though it is true, that an admiſſion in the anſwer of one of the defendants, that he is barely a truſtee for the benefit of the plaintiff, is ſufficient, provided the plaintiff has a good equity, yet it is not ſufficient for any other purpoſe; and if the plaintiff would draw any other argument from its being a truſt, he muſt make proof in the cauſe that it is ſo. Suppoſe then *Walters* had brought this bill himſelf, What relief is it that he could aſk after this length of time? It is proved in the cauſe, that very ſoon after this pledge was made to *Ewer*, ſeveral calls were made by the *Old Eaſt-India Company* upon the proprietors, their ſtock being then

LOCKWOOD AND OTHERS *againſt* EWER AND OTHERS; OR, LADY CHILD AND OTHERS *againſt* CHANCELLOR.

LOCKWOOD AND OTHERS *againſt* EWER AND OTHERS; OR, LADY CHILD AND OTHERS *againſt* CHANSTILET.

then in a decaying condition, and *Ewer* upon theſe calls paid in near fifty pounds *per cent.* As this has been ſo, can it be thought, becauſe the ſtock is now more valuable, that this Court would have decreed a redemption in favour of *Walters* after this length of time? All the perſons who were privy to this tranſaction are dead. In 1729, and not before, which was after the death of *Sir Thomas Coke*, *Ewer*, and *Walters*, a bill is brought by the executor of *Sir Thomas* in order to be allowed to redeem. If *Walters* himſelf had brought this bill after ſuch length of time, he could not have been allowed any benefit from it; and the plaintiff cannot be in a better condition than *Walters* himſelf would have been. For theſe reaſons the bill muſt be diſmiſſed.

So his Lordſhip was pleaſed to decree accordingly.

Caſe 104.

Portman *againſt* Seymour.

In Chancery, Eaſter Term, 15. Geo. 2. 1742.

A. ſettles his freehold eſtate upon *B.* and the heirs of his body, with remainders over, and ſurrenders his copyhold held of the manor of *Taunton* to *C.* upon condition that he ſurrender to *D.* and his heirs, ſubject, however, to *A.*'s will. *C.* accordingly ſurrenders to *D.* and *A.* by will, reciting the ſurrenders, deſires *D.* to contrive, if poſſible, that the copyhold might be continued to the owners of the eſtate at *Orchard*. *D.* ſurrendered this copyhold to the uſe of his will; and by the cuſtom of the manor, a ſurrender after ſeven years is void, and the eſtate goes to the widow; and outlives the ſeven years, and dies, having firſt made his will, and deviſed the copyhold to *B.* in tail, with remainders over as aforeſaid; and foraſmuch as *D.* is only a truſtee, equity will ſupply the defect; but there being no proof that it was poſſible by the rules of the manor to ſettle this copyhold in tail as the freehold, the cauſe was put off until further proof.

SIR WILLIAM PORTMAN being ſeiſed of a freehold eſtate at *Orchard*, in *Somerſetſhire*, ſettles it upon *Mr. Portman*, the plaintiff, and the heirs male of his body, with divers remainders over; and being alſo ſeiſed of a copyhold eſtate in fee, held of the manor of *Taunton-Dean*, in the ſame county, ſurrenders them to one *Mr. Croſs*, upon condition that he ſurrender to one *Mr. Henry Portman* and his heirs, ſubject, however, in his hands, to the will of *Sir William Croſs*. Accordingly ſurrenders were made into the hands of *Mr. Henry Portman*; and ſubſequent to the ſettlement of the *Orchard* eſtate, *viz.* on the 27th of *February* 1689, *Sir William* makes his will, and therein recites the purpoſes of the ſurrender to *Mr. Croſs* and to *Mr. Henry Portman*, and then he goes on in theſe words: "And I deſire of my couſin, the ſaid *Mr. Henry Portman*, "to contrive, if it is poſſible, that the ſaid copyhold lands may be "continued to the owner and owners of my eſtate at *Orchard*."

Mr. Portman continues poſſeſſed of this copyhold land, which is liable to this particular cuſtom, "that a ſurrender of any copyhold "land to the uſe of a will is only good for ſeven years; and if the "deviſor live more than ſeven years after ſuch ſurrender, it is as no "ſurrender; and in ſuch caſe, the widow is to have the eſtate as fully "as an heir at law." *Mr. Henry Portman* ſurrenders this copyhold eſtate to the uſe of his will in 1717, and makes his will ſoon after, but outlives the ſeven years from the time of the ſurrender.

By

By this will *Mr. Henry Portman* deviſed this eſtate to *Mr. Portman*, the plaintiff, with the ſame remainders over as are limited in the ſettlement in regard to the *Orchard* eſtate; and in the ſame will he deviſes to his wife a legacy of ten thouſand pounds, "in full "ſatisfaction and diſcharge of dower and thirds of or in any manors, "&c. whereof or wherein I am or ſhall be intereſted, and in diſ- "charge of all eſtates which I have granted heretofore to her for "life or years, whereof *Sir William* was heretofore ſeiſed." In the ſame will he further gives his wife his two beſt hunting-horſes, the beſt pair of coach-horſes, her wearing-apparel, her gold watch, and a great pearl necklace which ſhe uſually wore.

And the preſent bill was brought by the plaintiff *Mr. Portman*, who is entitled to the *Orchard* eſtate under the ſettlement, againſt ſeveral perſons, and eſpecially the widow of *Mr. Henry Portman*, who claims, as cuſtomary heir of her huſband, to have an account of the rents and profits of the cuſtomary eſtate, and to have them ſurrendered according to the cuſtom of the manor of *Taunton-Dean*, and to go according to the direction of the will of *Sir William Portman*.

MR. BROWN and MR. FLOYER argued *for the plaintiff, Mr. Portman*, That this copyhold eſtate was a truſt in *Mr. Henry Portman*; and that if he has not executed the truſt, the land ſhall be chargeable into whoſeſoever hands it comes; that indeed, in the preſent caſe, *Mr. Henry Portman* had executed the truſt defectively; for the ſurrender, as the caſe is circumſtanced, is no ſurrender; yet the Court will ſupply ſuch a defective execution of a truſt; or if it will not, that the copyhold ſhall ſtill be ſubject to the truſt in the hands of the widow, *Mrs. Towns*, though ſhe claims as a cuſtomary heir. For though this is not the caſe of an heir at common law, but by cuſtom, yet that will make no difference; for whether it be heir at common-law or cuſtom, yet they both make titles from the ſame fountain, their reſpective anceſtors. And where a perſon ſucceeds to an eſtate, whether as a common-law heir, or by cuſtom, as a purchaſor under a conveyance, yet the lands ſhall fall into all their hands loaded with the truſt. In caſe of gavelkind lands, the cuſtomary heir has been held to be liable to the warranty of his anceſtor. But it is here ſtronger, for it is in the caſe of a truſt; and if a truſtee do not execute his truſt, or execute it defectively, the *ceſtuy que truſt* ſhall not be injured, but the cuſtomary heir ſhall be anſwerable. An objection may be made to the declaration of this truſt in *Sir William Portman*'s will, wherein he deſires his couſin to contrive ſome way to ſettle the copyhold eſtate on the owners of the *Orchard* eſtates, that this word "deſire" is an expreſſion ſo much at large as to leave it entirely to the diſcretion of *Mr. Henry Portman* whether to ſettle it or not; and that the word "deſire" does not amount to a deviſe, but the word "de- "ſire" in a will is as ſtrong as "I deviſe, will, direct, com- "mand," and that it is mandatory and obligatory in all reſpects; and there is no particular technical word for a deviſe, for any words which

PORTMAN against SEYMOUR.

which expreſs the intent of the teſtator are ſufficient: and there is a caſe in 2. *Vern.* 228. where the very word "deſire" is held to amount to a deviſe, and not to be diſcretionary. The other objection which we ſhall make to the widow is upon the will of her late huſband *Mr. Towns*, wherein he gives her a legacy of ten thouſand pounds in full of dower and thirds which ſhe can claim of any of his eſtates, and in full of all eſtates for life or years out of *Sir William Portman*'s eſtate. He then goes on and deviſes to her coach-horſes, hunters, &c; and in the ſame will he deviſes the copyhold eſtate in diſpute to the plaintiff, and the heirs of his body. And the rule of law is, that whoever will take advantage of one part of a will muſt ſubmit to every other part of the ſame will, as well to thoſe parts which are to their benefit as to thoſe which are to their prejudice; and they cannot claim particularly, but muſt ſubmit entirely. If ſo, and the widow claims the ten thouſand pounds legacy, and the coach-horſes, hunters, &c. in the other clauſe, ſhe muſt not impeach our deviſe, but muſt let it be at reſt.

MR. ATTORNEY-GENERAL, *for the defendants*, argued, that as to the latter objection upon *Mr. Henry Portman*'s will, the legacy of ten thouſand pounds was given only in reſtraint of dower and thirds, which is a particular right, and cannot reſtrain the preſent right, which the widow ſets up as cuſtomary heir; that the other clauſe, being only a deviſe of paraphernalia, gives her no more than what was her own before, and ſo is void.

That the *Orchard* eſtate being ſettled to *Mr. Portman*, the plaintiff, and the heirs of his body, with remainders over, and the copyhold eſtate being deſired by *Sir William Portman*, if poſſible, to be ſettled in the ſame manner, it was incumbent on the plaintiff to have proved, that copyholds in the manor of *Taunton-Dean* are capable of being ſettled to the heirs of a man's body, with remainders over; for if they cannot, the eſtate will be diſcharged of the truſt, which is an impoſſible one, and will deſcend, according to the cuſtom, to the widow, the defendant.

HARDWICKE, *Lord Chancellor*. If this cuſtomary eſtate is capable of being limited in the manner as *Sir William Portman* has ſettled his eſtate at *Orchard*, then the clauſe in his will declaring that he had made a ſurrender for the uſe of it, and that he had directed the ſurrenderees to contrive it, if poſſible, that his copyhold eſtate might go to the owner and owners of his eſtate at *Orchard*, according to his ſettlement, will make it very plain that it was a truſt in the hands of *Mr. Henry Portman*; and according to the caſe in 2. *Vern.* 228, 229. *Alcock v. Sparhawk*, the word "deſire" is equal to deviſe, becauſe it expreſſes the intention of the teſtator; and the purpoſe of every will is to do no more. But if the copyhold eſtate is not capable of limitations of that kind, and *Sir William Portman* could not have ſurrendered the eſtate to the ſame uſes as the *Orchard* eſtate is ſettled, then the plaintiff cannot be entitled.

But

But taking this eſtate to be a truſt in *Mr. Henry Portman's* hands, and the queſtion, Whether his cuſtomary heir is to have the lands ſubject to it? as to that I AM OF OPINION, that every cuſtomary heir, if he take merely as heir, is equally in the power of his anceſtor with any heir at common law. But there have been caſes in abundance relating to copyholds and *boroughs Engliſh* where an anceſtor having ſurrendered and given his lands in ſuch manner as would bind an heir at common law, it has been held, that it would alſo bind his cuſtomary heir; and if *Mr. Henry Portman* took this as a truſt eſtate, its deſcending to his heirs by cuſtom will not impede the truſt. But if *Mr. Henry Portman* had had the legal eſtate ſubject to no truſt, and had made a ſurrender which was defective or void, as in the preſent caſe by his not dying within ſeven years after it, there his cuſtomary heirs ſhall not be bound, but ſhall take the eſtate becauſe of the imperfection of the ſurrender. Juſt as if a man deviſes copyhold lands without ſurrender to a ſtranger, as the deviſe is not good, the heir ſhall take them againſt the deviſee; but if the ſame deviſor took only a truſt in the lands, his heir ſhall be liable to the truſt, although the legal eſtate comes to him. Suppoſe lands to be ſurrendered upon truſt to a perſon to do a particular thing, and he neglects to do it, or does it imperfectly, and the legal eſtate falls to his cuſtomary heir, it ſhall be liable to the truſt. But all this depends upon this point, Whether this copyhold land is capable of being ſettled in the ſame manner as the *Orchard* eſtate.

PORTMAN *againſt* SEYMOUR.

Therefore this cauſe muſt go off until further proof.

Bagſhaw *againſt* Newton. Caſe 105.

In Chancery, 18 *October* 1743.

THIS BILL was brought for the payment of a legacy left to the plaintiff by his father's will, who died in 1719, the plaintiff at that time very young. It was a ſpecific legacy of the ſtock in the funds and *South-Sea* annuities, payable at twenty-one.

On a bill brought for a ſpecific legacy, coſts decreed out of the other part of teſtator's perſonal eſtate, that the legacy may be entire.

The executor did not appropriate any particular fund for the payment of this legacy, and died, leaving a conſiderable eſtate in the funds, which he, by will, had ſubjected to the payment of his debts.

THE COURT ordered intereſt to be computed at the rate of five pounds *per cent.* and reſolved, that when a ſpecific legacy is claimed in this court, the legatee muſt have coſts decreed him out of the other part of the teſtator's eſtate; for otherwiſe it would be to abridge the ſpecific legacy.

Brizick

Caſe 106.

Brizick *againſt* Manners.

Chancery, Eaſter Term, 15. Geo. 2.

A on an account ſtated, owes *B.* 400l. *A.* agrees to give bond for 100l. and to ſecure the remaining 300l. by mortgage. *A.* delivers a deed of conveyance to *C.* an attorney, who takes inſtructions to draw mortgage; but before the bond or mortgage executed *A.* dies. Though this agreement by parol be proved, yet on a bill brought againſt the heir of *A.* the Court refuſed to carry them into execution.

MR. BRIZICK, the plaintiff, having great dealings with the defendant's late father, in *April* 1740 they cloſed their accounts, and a balance of four hundred pounds and odd appeared to be due to the plaintiff. *Mr. Manners*, to ſecure this debt to the plaintiff, agreed to make a mortgage of his *Paxton* eſtate for three hundred pounds, to give a bond for one hundred pounds, and to pay the odd money in ready caſh. In purſuance of this propoſal, *Mr. Manners* delivered a deed of conveyance to *Mr. Conyers* of the *Paxton* eſtate; and *Mr. Conyers*, being an attorney, took inſtructions in writing for a mortgage; but *Mr. Manners* dying in a month after, the mortgage-deed was not drawn or executed. The parol agreement for giving the bond for the other one hundred pounds was proved in the cauſe.

And now this bill was brought by the plaintiff againſt *Mr. Manners's* heir at law, that his debt, as to the one hundred pounds, might be conſidered as a bond debt to charge the real eſtate; and that the defendant, his heir, may be decreed to execute ſuch bond as his father had by parol agreed; and that as to the three hundred pounds, it may be conſidered as a mortgage upon the *Paxton* eſtate.

HARDWICKE, *Lord Chancellor*. As to the prayer of the bill in relation to the three hundred pounds, and the having that conſidered as a mortgage upon the *Paxton* eſtate, that is a point given up; for what was done by the parties in writing was not done by way of agreement or contract, but only as inſtructions to an attorney for a further act to be completed afterwards; and it was given, not to be evidence of a contract, but only as an aſſiſtant to the attorney's memory, by way of inſtruction to prepare a deed to be executed; and theſe inſtructions were not ſigned by the party, and all the affair was not executed. If this was to be decreed as the party's agreement, in every caſe where a man had given looſe inſtructions to draw articles, the party might be brought into this court to decree a performance as of articles themſelves: a thing which has never yet been carried ſo far in this court.

As to the one hundred pounds which is proved, the defendant agreed to give a bond for it, and had given inſtructions to an attorney to draw it; but upon what penalty, upon what condition, upon what intereſt, or at what time payable, does not at all appear; and therefore it is impoſſible for the Court to carry ſo uncertain an agreement into execution; for it would be at a loſs what decree to make.

It has been inſiſted for the plaintiff, that if a man borrow a ſum of money, and promiſe to give a bond for it, and do not, that an action on the caſe will lie, and damages may be recovered; and that therefore a bill may be brought for an execution of ſuch a promiſe

promiſe in this court; but I do not know that there ever was ſuch a decree, not even before the ſtatute of Frauds and Perjuries. Thus far the Court, to be ſure, would go, that ſuppoſe a man intended to lend a ſum of money upon bond, and paid it, and the other party then refuſed to give the bond, this Court would carry ſuch a parol agreement into execution becauſe of the fraud on one party; but there is no ingredient of fraud in the preſent caſe. But at the ſame time, I will not ſay off-hand that the Court would not decree the preſent agreement againſt the party himſelf if it had been more certain; for as againſt the party himſelf, the bond might have been conſidered as a perſonal contract, not binding immediately the land itſelf, but only in its conſequences, *viz.* by recovering judgment upon it, which may be done alſo upon every ſimple contract. But this is a bill not againſt the party himſelf, but againſt his heir; and how does the caſe ſtand as to him? Why, the bill is brought againſt him in the alternative, either to execute a bond, or to charge the lands with this as with a bond not within the ſtatute of Frauds and Perjuries, which requires agreements to be in writing that affect land; yet a bond charges an heir; and upon an action brought againſt him upon ſuch bond, if he has no land from his anceſtor, he may diſcharge himſelf by a plea of *riens per diſcent*; and if he has lands, he will be charged as to them; but if I decree him to execute this bond himſelf, he will be perſonally liable; and as to lands of his own purchaſe, he can by no plea diſcharge himſelf therefrom; and I cannot make a decree that the heir ſhall bind himſelf upon this parol contract, though of full age, becauſe it would be putting him in a much worſe condition than if his anceſtor had executed the bond, becauſe his anceſtor's bond could only charge him as having lands by diſcent; which I cannot do, becauſe it would be ſetting up a parol contract to affect lands; which this Court cannot do, becauſe it would be within the ſtatute of Frauds and Perjuries.

BYRICK *againſt* MANNERS

As to the other part of the prayer of the bill, the plaintiff comes directly to affect the lands, for he prays a ſale of them upon this parol agreement, which is plainly ſetting up a parol contract to affect the lands; and the agreement to ſuch a purpoſe ought as much to be in writing as an agreement for a ſale, mortgage, or any other conveyance of an eſtate.

But ſuppoſing the parol contract to be out of the ſtatute of Frauds and Perjuries, and I had power to decree a ſpecific performance, yet it could not be poſſibly done for the uncertainty of this agreement, which is always a rule to induce this Court to refuſe a ſpecific execution; for what condition could I name, or what penalty? Could I now have done this againſt the anceſtor himſelf? When muſt I make the money payable? and, At what rate of intereſt? All this is uncertain. And I do not know whether this man would have bound his heirs; for an heir is not neceſſarily bound by the bond of his anceſtor, nor ever is, unleſs he be expreſsly named; and I have ſeen bonds come into this court where the

Herbert *againſt* Manners.

the heir has been omitted; and a man may give a ſpecialty without binding his heir. If the bill had been brought againſt the anceſtor, the Court would have decreed the bond in the common form; but the caſe is different when a bill is brought againſt the heir, for nothing can bind him but what creates a lien upon the land, which a parol contract cannot do, becauſe of the ſtatute of Frauds and Perjuries. And it would be a thing of moſt dangerous conſequence to extend agreements by word of mouth in the diffuſive manner contended for, *viz.* that what is verbally contracted to be done is as though it was done; for this would be taking away the conveniencies of the ſtatute, and would throw agreements into the ſame looſeneſs and uncertainty as was before that act of parliament.

For three reaſons then I muſt diſmiſs the bill: firſt, That this parol contract cannot affect the land, and therefore, ſecondly, not the heir; and thirdly, this verbal agreement is uncertain in the penalty, time of payment, intereſt, &c. Theſe are ſufficient cauſes for the Court not to carry this oral agreement into a ſpecific performance.

And his Lordſhip decreed accordingly.

Caſe 107.

The Attorney-General *againſt* Landerfield.

In Chancery, Michaelmas Term, 17. Geo. 2.

A. deviſed his real and perſonal eſtate to *St. Bartholomew's Hoſpital*; and it being doubted whether this deviſe was within the ſtatute of Mortmain, the governors of the hoſpital and next of kin came to an agreement, that one-fourth ſhould be paid to the next of kin, the other three-fourths to the hoſpital; and this agreement carried into execution.

A. BY WILL *deviſes all his eſtate both real and perſonal* to the hoſpitals of *Saint Bartholomew, &c.* and it being a queſtion, Whether this deviſe was within the late ſtatute of Mortmain? the governors of the hoſpitals, &c. and the next of kin came to an agreement, that all the eſtates, both real and perſonal, ſhould be ſold, and divided into four parts, one of which was to be for the next of kin, and the other three to be paid to the uſe of the ſaid corporations. The leaſehold was four hundred pounds a-year, and the perſonal four thouſand five hundred pounds after debts paid. This agreement came now to be eſtabliſhed in chancery. But it not appearing what proportion the leaſehold and perſonal eſtates bore to the real, the Court was unwilling to decree until the Maſter ſhould report, whether this agreement was for the benefit of the charity; for by the writing it appears to be a propoſal only, and no agreement. If the latter, the agreement of ſo great a corporation would have great weight with me; but theſe corporations are only truſtees for the ſeveral charities, and cannot alienate the lands or eſtates given to thoſe uſes. And theſe eſtates are diſtinct from thoſe which they are ſeiſed of as mayors, &c. of *London*.

NOTE, This agreement was afterwards eſtabliſhed by a decree.

NOTE, In this caſe the attorney-general argued, that as corporations could not be ſeiſed to an uſe at law, no more could they be truſtees, but ſhould have the lands to their own uſe, diveſted and freed from the truſt. 1. *Co. Cheedliegh's Caſe.*

But

But THE CHANCELLOR would not let him go on, nothing being clearer than that corporations might be truſtees. Corporations may be truſtees.

Levi Gomez *againſt* Graham, Philips, and Gold. Caſe 108.

In Chancery, Eaſter Term, 15. Geo. 2.

THE DEFENDANT *Graham* being fort-major of *Annapolis Royal*, in *Nova Scotia*, in *America*, with the pay of eight ſhillings a-day, and being in want of money, borrowed the ſum of two hundred and twenty-five pounds of the plaintiff, and made an aſſignment of his pay to him to anſwer an annuity of thirty pounds to the plaintiff for *Mr. Graham*'s life, by quarterly payments, with a power, however, in *Mr. Graham* to redeem in two years time, upon giving ſix months notice. The plaintiff ſhewed this aſſignment to the defendant *Gold*, who was agent for the payment of all the officers ſalaries in *Nova Scotia*, who refuſed to take notice of it, or to pay any part of the annuity. Upon which *Mr. Gomez* brought this bill againſt *Graham*, *Gold*, and alſo againſt *Philips*, who is general or governor of *Nova Scotia*; and the prayer was, to have the annuity paid by the defendants *Philips* and *Gold* out of *Graham*'s pay from the time the aſſignment was ſhewed to *Gold*, or that *Graham* might pay the two hundred and twenty-five pounds and intereſt, and be obliged to redeem the annuity.

A major of a fort borrows 225l. of *B.* For ſecuring to *B.* an annuity of 30l. during *A.*'s life, aſſigns over his pay of 8s. a-day, with a power to redeem. *B.* ſhews this aſſignment to *C.* the pay-agent, who refuſes to take notice thereof. Wherefore *B.* brings his bill againſt *A.* and *C.* And decreed, that the pay ſhould be ſecured to *B.* but that *C.* as agent, was not bound to take notice but from the time of the filing the bill, becauſe of the inconveniency. The general and governor of *Nova Scotia*, where the fort lay, was made a party; but bill diſmiſſed as to him.

MR. ORD, WALKER, and MURRAY, *for the defendants*, argued, that the caſe of the plaintiff did not deſerve any countenance in equity, for the perſon who aſſigned his pay is only fort-major of a town in *Nova Scotia*, with a ſalary of eight ſhillings a-day only; and if an officer of ſo ſmall an allowance is to aſſign his pay, liable to a conſiderable annuity, he will not be able to keep himſelf, and to anſwer the character of his office, which will be prejudicial to the public utility. Beſides, he may have made aſſignments of the ſame pay, and the agent ought not to keep a book to enter theſe aſſignments in, nor to take upon him the office of chancellor, in caſe there are ſeveral aſſignments of the ſame pay, to determine which has the priority, and if he pay the money wrong to be liable to a repayment upon that account. In all the great Companies, as the *South-Sea Company*, if a proprietor of ſtock aſſign it, or part of it, to another, and the aſſignee bring his aſſignment to the proper officer, he takes no notice of ſuch aſſignment, for they will not load their books with ſuch multiplicity of aſſignments as might be made. And if in ſuch caſe the officer pay the ſtock to the perſon in whoſe name it ſtands, and the aſſignee bring his bill, if he was to be liable to pay this again to the aſſignee upon the foot of notice, it would ſubject the officer to the greateſt perils imaginable.

MURRAY, *for the defendants*, argued, and ſaid, the only queſtion is, Whether the bare hands or inſtruments to pay public money to ſoldiers are to take notice of aſſignments of ſoldiers pay, ſo as to be liable

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liable to a repayment if he refuſe to pay to the aſſignee, and pay to the perſon who is entitled by his poſt to receive. In point of law, *choſes in action* cannot be aſſigned, and the aſſignee could recover them no otherwiſe againſt the agent than by ſuing in the defendant *Graham*'s name; and in aſſignments of *choſes in action*, there is generally a covenant to ſue in the aſſignor's name; that this Court relieves aſſignees of *choſes in action* only in particular circumſtances (*a*), for there muſt not be only a valuable conſideration, but alſo no mixture of fraud; and if any inconvenience ariſe in the relieving againſt the rule of common law, this Court will not do it, and here in relief to the plaintiff the public utility would be damaged, as is ſhewed above. He then cited the caſe where the great Companies will not take notice of aſſignments of ſtocks. That if an officer has a right to aſſign his pay, every common ſoldier has a right to do the ſame; and it would be endleſs for a paymaſter to enter all aſſignments, and to be liable to repayment if he did not pay the aſſignees: That this annuity was an anticipation of the officer's pay, for it is an annuity chargeable on the ſalary for the life of the officer; and if every common ſoldier could make ſuch laſting charges on his pay *before it accrued due*, he muſt ſtarve, and be quite diſabled to fulfil his duty, or to anſwer the demands of his country: That by the cuſtom of the army, the agent is not obliged, nor ought, to pay any ſalary but to the ſoldier himſelf: That by the late act of parliament of Mutiny and Deſertion it is enacted, "That if any agent, paymaſter, or "clerk, do wilfully detain any ſoldier's pay for the ſpace of one "month after it become due, he ſhall forfeit his office, be incapable "of holding any other, and pay one hundred pounds:" That the paying theſe aſſignments to ſtrangers, and not to the ſoldier, may perhaps be conſtrued to be a wilful detaining: That this bill, eſpecially as to *Mr. Philips*, ought to be diſmiſſed with coſts, for he is general and governor of *Nova Scotia*, but receives no public money, nor pays any; that although he names the agent, yet it is not as deputy, but names him merely as an officer having power to name other ſubordinate officers.

HARDWICKE, *Lord Chancellor*: As to *Mr. Phillps*, who is general and governor of *Nova Scotia*, there was no ground to make him a defendant to this bill; for it is not pretended that the pay comes to his hands; it is iſſued through the hands of the paymaſter-general to the agent; and the Legiſlature, in the ſtatute of Mutiny and Deſertion, which directs the pay of ſoldiers, takes notice of the paymaſter, agent, or clerk, in expreſs words; but there is no notice at all of the general or governor. In caſes of this kind, it would be very miſchievous if bills were to be entertained againſt generals of regiments upon aſſignments made of the pay of any officer, and that they ſhall be affected by notice when there is not any proof of notice, and not pretended that any pay

(*a*) 1. Term Rep. 26. 619.

goes

goes through their hands. Therefore the bill as to him muſt be diſmiſſed with coſts.

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As to the defendants *Graham*, and *Gold*, the agent, there have been ſeveral objections made, and principally upon the conſideration of public utility. It has been ſaid, that theſe ſorts of aſſignments ought to be void; but this is a defence which comes much better from the mouth of *Gold* than *Graham*, who granted the aſſignment, and received a valuable price for it. This objection undoubtedly deſerves to be conſidered. I wiſh practices of this kind were to be avoided; for there may be many inconveniencies ariſing to the public by granting anticipations of pay before it is due, or making annuities out of it, eſpecially by leſſer officers, where their pay is ſcarcely a maintenance, and thereby diſabling them from ſerving their country. Yet it is very difficult to tell in what place to draw the line to reſtrain theſe aſſignments; for as there are, on one hand, great inconveniencies, ſo, on the other, ſuch aſſignments have their advantages. For where an officer has a family, he may not be able to maintain it without ſuch aſſignments, or ſome other kind of draughts upon the agent; for they may want perſonal credit; and in caſes where an officer may want a pretty large ſum for public occaſions, as to buy himſelf tents and beds to incamp abroad, he may not be able to buy without theſe ſorts of ſecurities upon his pay. If I ſhould reſtrain theſe aſſignments generally, I ſhould only make a monopoly of theſe ſorts of ſecurities to agents; and upon ſuch a decree, conſequences of a worſe kind would ariſe than where ſuch aſſignments are made upon good and full conſideration: therefore I ſhall be very cautious in laying down any ſuch rule. I wiſh any evidence had been given, that it is the cuſtom of the army that ſuch aſſignments are not good, and that the agents never take any notice of them, or pay them; for certainly theſe aſſignments are not reſtrained by anything in the Mutiny and Deſertion Bill; for the agent there, if he *wilfully detains* any pay for one month after it ſhall be due, is ſubjected to very hard penalties; but his paying theſe aſſignments to the aſſignees, and not to the ſoldier himſelf, is no wilful detainer, for the ſoldier by his deed has conſented that the pay ſhall be withheld from him, and paid to a third perſon.

As to the practice of the army there is no proof, but I believe both in THE FLEET and THE ARMY, that it is the cuſtom every day to do the ſame thing. Tickets of ſeamen, and letters of attorney to receive ſailors pay in the fleet, were in daily uſe until a late act of parliament to reſtrain ſuch ſailors tickets; and this ſtatute is evidence of the general cuſtom before. And if the Legiſlature ſees the ſame inconveniencies ariſe from the aſſignments of ſoldiers pay, they will reſtrain it; and it is not for this Court to do it againſt the univerſal practice, where ſuch aſſignments are made upon valuable conſideration, and without fraud. Suppoſe an officer wants money, and borrows it of his friend, and draws a bill upon the agent to pay to *Mr. A.* or order, ſo much out of his growing ſubſiſtence:

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theſe bills have been common, and upon the acceptance of the agent ſeveral actions have been brought upon the cuſtom of merchants in the king's bench; and the queſtion has been, Whether ſuch draughts have been bills of exchange? And they have been held not to be ſo (*a*): ſo alſo to pay out of growing rents are not bills of exchange; for it is uncertain, from the accidents of bad tenants and the *quantum* of the rent, when it will anſwer the draught. But though ſuch notes are not bills of exchange, yet if they are accepted, the party, by changing his action, has a remedy againſt the acceptor, though he cannot declare upon the cuſtom of merchants. And if the party has a remedy upon the agent's acceptance of theſe bills, why is he to be remedileſs upon an aſſignment, which is as good a conveyance of the property as a bill accepted? If theſe aſſignments were to be diſallowed, officers, in many caſes, would not be able to live. To lay down a rule againſt them where there is no fraud, would be laying down a reſtraint againſt a general practice; and if the inconvenience is very great of theſe aſſignments, the Legiſlature will prohibit them, as it has done ſeamen's wages. If there had been any proof of fraud in the tranſaction, or any ſpecial inconvenience attending this ſingle caſe, or that it was againſt the practice, it ſhould have had its weight. Therefore upon the whole, I am of opinion, that this aſſignment of pay to ſecure an annuity is good, and that it is not to be ſet aſide.

Another queſtion ariſes in relation to the defendant *Gold*, How far he is to be affected by notice of this aſſignment? It is proved, that this aſſignment was brought to *Gold*, the agent, who ſaid he would have nothing to do with it. And the plaintiff now inſiſts, that as this notice affects the agent, he ought to have ſtopped the pay, and ought from that time to be conſidered as a truſtee for the annuitant *pro tanto*; and that if he pay the whole ſalary to *Graham*, he pays it in his own wrong, and ought to repay it to the annuitant and aſſignee. The Counſel for the defendant *Gold* inſiſt, on the other hand, that *Gold* might refuſe paying or taking notice of this aſſignment; that the public Companies, as *the Bank*, the *Eaſt-India Company*, and *South-Sea Company*, will not accept of aſſignments of ſtock, or parts of ſtock, or bills drawn upon them by people who have ſtock, for it would be inconvenient to load the public books with ſuch multiplicity of matter, for a man might draw a hundred bills for one hundred pounds; and therefore they will pay no money but upon transfer. And I ſhall be cautious in obliging agents to take notice of theſe aſſignments; for there may be ſeveral aſſignments of the ſame pay: and I would not put agents to the difficulty of determining the priority of ſuch aſſignments; for if an agent determine wrong, he would be liable to an account and repayment to the proper perſon intitled. And therefore I do declare, that *Gold*, the agent, is not to be affected by this kind of notice. Suppoſe an officer draw a note on the agent, in the form of a bill

(*a*) Joſſceline *v.* Laſſere, 10. Mod. 294. 316.

of

of exchange, to pay ſo much to *A. B.* or order out of his growing ſubſiſtence, and the agent refuſe to accept it, will any court of law or equity ſay he is obliged to ſtop the pay in his hands? It would be very miſchievous to make public paymaſters take notice of ſuch aſſignments. Therefore he is not to be affected upon the head of notice in the preſent caſe until his being ſerved with a *ſubpœna* of the bill, or until his own anſwer.

And his Lordſhip decreed THE MASTER to take an account of what became due to the defendant *Graham* from the defendant *Gold* for his pay from the time of the putting in the anſwer of the defendant *Gold*: And let the defendant *Gold* pay to the plaintiff ſo much as ſhall be found due to him for his arrears of the ſaid annuity out of what ſhall be found to have became due to the defendant *Graham* for his pay on the account before directed; and let the defendant *Gold* continue to pay to the plaintiff the growing payments of the ſaid annuities of thirty pounds a-year, quarterly, out of the pay of the defendant *Graham*, as far as ſhall come to his hands, as long as the defendant *Graham* ſhall be entitled to ſuch pay, and the annuity ſhall continue; and in caſe the defendant *Graham* ſhall be minded to redeem this annuity, purſuant to the clauſe in the aſſignment for that purpoſe, let him be at liberty to apply to the Court for directions touching ſuch redemption; and let the bill be diſmiſſed as againſt the defendant *Philips*, *&c.*

His Lordſhip ſaid, it had been determined in this court upon great conſideration, that an officer's pay might be ſeized upon a ſequeſtration (*a*).

(*a*) On the authority of this caſe it was decided in the court of common pleas, that although an officer's half-pay is not aſſignable at law, yet the uſe of it may be aſſigned in equity, and that when ſo aſſigned, the aſſignor cannot maintain an *aſſumpſit* for it as money had and received to his uſe, Stuart *v.* Tucker, 2. Bl. Rep. 1137. But in the matter of *Kennedy*, a bankrupt, it was held, in *December* 1788, that an officer's half-pay is not aſſignable, Cook's B. L. 355. *notis.* S. P. Cathcart *v.* Blackwood, in the Houſe of Lords, 26 *February* 1765. In the caſe of Flarty *v.* Odlum it was decided, that the half-pay of an officer is not the ſubject of ſale; and therefore, that creditors cannot compel him to include it in his ſchedule under the Lords Act, 3 Term Rep. 681. Nor is the full-pay of an officer aſſignable, Barwicke *v.* Reade, 1. H. Bl. Rep. 627. And it makes no difference whether ſuch full or half pay be actually due and receivable at the time of the aſſignment or not, Lidderdale *v.* Montroſe, 4. Term Rep. 248.—It has been held alſo, that the king may at any time ſtop the pay of an officer in the army, by ſignifying his pleaſure that it ſhall be no longer paid, Macdonald *v.* Steele, Sittings after Hilary Term, 33. *Geo.* 3. Peake's N. P. 175.

Caſe 109.

Rogers *againſt* Downs and Others.

In Chancery, Eaſter Term, 15. Geo. 2. 1742.

A. deviſes his freehold and copyhold lands (after a ſurrender) to *B. C.* and *D.* and their aſſigns, until *E.* and *F.* attain their ſeveral reſpective ages of twenty-one years, in truſt, that they ſhould receive the rents and profits for the maintenance of *E.* and *F.* until they ſhould attain their ages of twenty-one; and then deviſed both freehold and copyhold to *E.* and *F.* for life, without impeachment of waſte; and from and after their deceaſes, for the uſe and behoof of their heirs as tenants in common, and not as jointenants. *A.* died, and *E.* attains the age of twenty-one; and by leaſe and releaſe conveyed to *Martha Rogers* and her heirs the moiety of his lands, farms, tenements, &c. Held, that *E.* and *F.* were jointenants for life with ſeveral inheritances in common; for an eſtate in jointure cannot ſink into a fee of a different nature: and held, that the common-law conveyance did not ſever the jointure of the copyhold, as it would have done if the ſame had been made by a jointenant of a truſt only, becauſe no ſurrender could in ſuch caſe be made.—S. C. 2. Atk. 304.

ADAM CHURCHER, being ſeiſed of freehold and copyhold lands in the county of *Suſſex*, made his will in 1736, whereby he deviſed both freehold and copyhold lands, there being a previous ſurrender to the defendants, *Downs*, *Barnard*, and *Aylmere*, and their aſſigns, until his kinſmen *Thomas Bonny*, and the defendant *Rogers*, attain their ſeveral and reſpective ages of twenty-one "years, upon truſt, that the ſaid *Downes*, *Barnard*, and *Aylmere*, "ſhould receive the rents and profits for the maintenance of "*Bonny* and *Rogers* until they ſhould attain their ages of "twenty-one years:" and then he deviſed both freehold and copyhold lands to *Bonny* and *Rogers* for life, without impeachment of waſte; "and from and after their deceaſe, for the uſe and "behoof of their heirs as tenants in common, and not as joint-"tenants."

After this, the teſtator *Adam Churcher* died. *Thomas Bonny* arrived to his age of twenty-one, whereby the lands veſted in him; and being ſeiſed of the moiety of both freehold and copyhold, by leaſe and releaſe, in 1740, between himſelf of the one part and his ſiſter *Martha Bonny*, ſince married to the plaintiff *Rogers*, on the other part, granted to the plaintiff *Martha Rogers* and her heirs "all the moiety of his lands, farms, tenements;" and then alſo made his will, and gave her all his perſonal eſtate, and made her his executrix.

This bill was brought in order to have an account of the rents and profits of both freehold and copyhold, and that ſhe may have a moiety of thoſe which have accrued ſince *Bonny*'s death; that her teſtimony may be perpetuated; that there may be a partition of the freehold and copyhold eſtates; and that one moiety may be decreed to her and her heirs; and ſhe offers to ſecure an annuity which is chargeable on the eſtates.

MR. CHUTE, MR. NOEL, and MR. WILBRAHAM, *for the plaintiff*. The queſtion, they ſaid, was, Whether this deviſe to *Bonny* and *Rogers* was a joint eſtate for their lives, with a fee-ſimple in remainder to them as tenants in common? or, Whether it was not an immediate fee-ſimple in them as tenants in common? If it was the firſt, the defendant *Rogers* would be entitled to the whole eſtate by ſurvivorſhip; if the laſt, the plaintiff had brought her bill very properly to have a moiety of the rents and profits ſince *Bonny*'s death, and to have an immediate moiety of the fee-ſimple by partition.

They

They argued, that as the eſtate is limited to the anceſtors for life, with an immediate deviſe to their heirs, their heirs cannot by this deviſe, be purchaſors, for they are to be conſidered as totally in their anceſtors, and muſt take by deſcent; that the eſtate for life intended to paſs is a mere nullity, and muſt merge in the inheritance, there being no intermediate eſtate to ſupport the eſtate for life, and to keep it diſtinct from the inheritance; that ſuppoſing this deviſe to be a joint eſtate for life and tenancy in common in remainder, and ſo the plaintiff *prima facie* not entitled to anything until after the death of *Rogers* the ſurvivor, yet the deed of leaſe and releaſe, by *Bonny* to the plaintiff *Martha*, is a ſeverance of the jointenancy; that as to the ſeverance of the freehold eſtate there can be no doubt; and the only diſpute can be, whether the jointenancy of a copyhold eſtate can be ſevered by a leaſe and releaſe, which is a common-law conveyance. They ſaid, there was no caſe in point where it is ſaid that there muſt neceſſarily be a ſurrender to ſever the jointure of a legal eſtate of a copyhold; that a leaſe and releaſe is certainly a manifeſtation of *Mr. Bonny*'s intention; and as it is for the benefit of his ſiſter and heir, it ſhall be deemed a ſufficient ſeverance without a ſurrender; that if a leaſe and releaſe will not ſever the jointure of the legal eſtate of a copyhold, yet it will ſever the jointure *(a)* of the truſt of a copyhold; that this preſent deviſe is an equitable or *ceſtui que truſt* eſtate in *Bonny* and *Rogers*, which may be conveyed without ſurrender; and that the legal eſtate of freehold was in *Downes*, *Barnard*, and *Aylmere*, until *Bonny* and *Rogers* ſhould attain their ſeveral ages of twenty-one.

MR. ATTORNEY-GENERAL and MR. HOSKYNS, *for the defendants*, argued, that this deviſe was a joint eſtate in *Bonny* and *Rogers* for their lives, with a remainder in fee to their heirs as tenants in common; and to prove this they cited the caſe of *Barker v. Gyles (b)*, and *Tuckerman v. Jefferies (c)*; that in the preſent will, there ſeemed to be two diſtinct and conſiſtent deviſes; for the teſtator by the firſt deviſe gives the eſtate to *Rogers* and *Bonny* for life, without impeachment of waſte, which is a joint eſtate; and then goes on and makes a ſecond deviſe, as though to a third perſon, and gives the fee to the heirs of *Rogers* and *Bonny*, as tenants in common; that in this caſe the eſtate for life, as it is joint, does not ſink into the remainder, which is a tenancy in common; and if an eſtate be made to two, and to the heirs of one of them, they are jointenants for life, with a ſole fee-ſimple in remainder to one of them; that it muſt be admitted that the leaſe and releaſe, as to the freehold, is a ſeverance of the jointure, but it is no ſeverance of the copyhold, for two reaſons. The firſt is, that the leaſe and releaſe does not in effect extend to or include the copyhold, for it is of lands generally; and upon the face of it it does not appear that there is any expreſs mention of the copyhold; and if the word "copyhold" is omitted, it cannot be intended to take the copyhold eſtate in; for if a man has both copy-

(*a*) Ante, 45. Gibſon *v.* Styles.
(*b*) 2. Peer. Wms. 280.
(*c*) 11 Mod. 108.

ROGERS *againſt* DOWNS AND OTHERS.

hold and freehold eſtates in the ſame pariſh, and he deviſes all his lands generally in that pariſh, the copyholds will not paſs. The ſecond is, that a leaſe and releaſe, being a common-law conveyance, and adapted to freehold eſtates, was never of any conſideration to affect a copyhold, either to convey or ſever a jointure of it. But it is objected, that *Bonny* and *Rogers* had only an equitable intereſt in the copyhold, which is barrable by leaſe and releaſe, or any other common-law conveyance; and that the legal eſtate and freehold was in the truſtees, and therefore no occaſion for a ſurrender. But that is a miſtake; for the legal eſtate is not in the truſtees, for they have no eſtate of inheritance or freehold, it being only given to them and their aſſigns until *Bonny* and *Rogers* attained their ages of twenty-one, which is only a chattel intereſt for years, and no eſtate for life or freehold; and therefore the freehold is in the jointenants *Bonny* and *Rogers*; and two jointenants of a copyhold can neither ſever, ſell, or do any act without a ſurrender, unleſs it be to make a leaſe for a year, according to the general cuſtom of all manors.

HARDWICKE, *Lord Chancellor*. There have been two general queſtions made in this caſe.

The firſt, Whether, by the words of this will, there is a deviſe to *Rogers* and *Bonny* for life as jointenants, with a remainder in fee as tenants in common? or, Whether it is not an immediate eſtate in fee to them as tenants in common?

The laſt, Suppoſing it to be a joint eſtate for life in them, whether, by force of the deed executed by *Bonny* before his death, here has been a ſeverance of that jointure?

Here are two ſets of deviſes; the firſt to *Downs*, *Aylmere*, and *Barnard*, the truſtees. And a queſtion ariſes, upon what eſtate they took. AND I AM OF OPINION, that they took nothing in the inheritance or freehold, but only a chattel intereſt to them and their aſſigns until *Rogers* and *Bonny* attained their ſeveral ages of twenty-one years; and this chattel intereſt was to continue until the youngeſt of them, or if one died until the ſurvivor, attained his twenty-firſt year, before it determined. The truſt upon which it is given is to receive the rents, iſſues, and profits, to the uſe and behoof, and to the ſupport and maintenance of *Bonny* and *Rogers* until they are twenty-one. And as this chattel intereſt in the truſtees is to continue until the younger of *Rogers* and *Bonny* is twenty-one, I am of opinion, that if one of them die the profits will go to the ſurvivor, if he is under twenty-one, for ſo long the truſtees will have a right to receive. This being the conſtruction of the firſt clauſe and the truſt, it will throw a great light upon the ſubſequent deviſe to *Rogers* and *Bonny*, which is the ſecond deviſe.

As to the ſecond clauſe, it is a deviſe of the remainder of a legal eſtate, and not a deviſe of a truſt; for there was no freehold in the truſtees, but only a chattel intereſt. That being ſo, the deviſe

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is to them for their natural lives without impeachment of waſte; and after their *deceaſes*, then to their heirs as tenants in common, and not as jointenants. What was the intent of the teſtator in this? It was to have made *Rogers* and *Bonny* tenants for life; and therefore he adds the words "*without impeachment of waſte:*" and "after their *deceaſes*" gives the eſtate to their heirs. And if this intent could have been ſupported, then *Bonny* and *Rogers* would have been jointenants for life without doubt; and as it is from and after their *deceaſes* that the heirs are to take in the deviſe over, it is plain they cannot take until after the deceaſe of the ſurvivor, which makes the jointure very plain, and brings it near to the caſe of *Tuckerman v. Jefferies*, whereby the teſtator gave and deviſed his eſtate to his two nieces *Elizabeth* and *Jane*, *equally to be divided*; *and after the death of both of them*, then to the heirs of *Jane*; and determined to be a joint eſtate for life, notwithſtanding the words "equally to be divided;" for as the heirs of *Jane* were not to take until after the death of both of them, which muſt be after the death of the ſurvivor, it muſt of neceſſity make a joint eſtate; which is the caſe here; for the heirs are not to take until after the deceaſes of *Bonny* and *Rogers*, which muſt be of the ſurvivor of them.

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Rep. Q. A. 108. Holt, 370.

But the rule in law in *Shelly's Caſe*, which has been held for good law ever ſince, is, that where there is an eſtate to an anceſtor for life, and afterwards in the ſame deed there is an eſtate limited to the heirs of the ſame anceſtor mediately or immediately, the inheritance veſts in him, and the heir cannot be a purchaſor. If ſo, this eſtate for life, it is inſiſted, ſinks into the inheritance, there being no meſne eſtate to keep them diſtinct and independant; and that therefore the intent of the party to give an eſtate for life to the two anceſtors is overcome by the rule of law. And though this may be true where an eſtate is limited to a man ſolely for his life, without impeachment of waſte, and after his deceaſe then to his heirs, yet a man may make two perſons jointenants for life, with a remainder immediately to their heirs as tenants in common, without the eſtate for life's being merged in the fee; for an eſtate for life in jointure cannot ſink into a fee of different nature and quality as a tenancy in common is. And this is agreeable to the reſolution in the caſe of *Barker v. Gyles (a)*, which was thus: One deviſes lands to *Jerome* and *Robert Barker*, and the ſurvivor of them, and their heirs, equally to be divided between them, ſhare and ſhare alike; wherefore LORD CHANCELLOR KING, it being the firſt cauſe which came before him, decreed, that the firſt part of the deviſe being to two and the ſurvivor of them, makes them plainly jointenants for life; and that as to the next words, "and to their "heirs, equally to be divided between them, ſhare and ſhare "alike," they are plainly words importing a tenancy in common, and ſhall operate accordingly, ſo as to make them tenants in common of the inheritance; wherefore he held the two co-deviſees

(a) 2. Peer. Wms. 280.

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to be jointenants for life, with ſeveral inheritances to them in common. And this decree was affirmed upon an appeal to the Houſe of Lords. And this is agreeable to the aforeſaid caſe of *Tuckerman v. Jefferies*. As to the caſe of *Bliſſet v. Cranwell (a)*, it is different from the preſent caſe: the words there are, "I give and bequeath "to my ſons *Richard* and *Robert*, and their heirs for ever, and the "*longer liver of them, to be equally divided between them*, after my "wife's death, all that my meſſuage, &c.;" and held, that the two brothers were made tenants in common in this will; for there they rejected the words "the longer liver of them; which makes the caſe quite different from the preſent. There is another ſtrong reaſon which governs this caſe upon the firſt clauſe. AND AS I AM OF OPINION, that by the firſt clauſe, "during the continuance of "the truſt," which is until the younger or the ſurvivor is twenty-one, the whole profits would go and ſurvive to the benefit and ſupport of the ſurvivor until twenty-one, it would be inconſiſtent to ſuppoſe, if one died, and the other ſhould have the whole until twenty-one, that after he attained that age it ſhould go to the heir of that perſon. As to the ſecond general queſtion, Whether the leaſe and releaſe of *Bonny* has ſevered the jointure of the copyhold eſtate? there is no doubt but it is a ſeverance of the jointure of the freehold eſtate, but I do not ſee how it can ſever the jointure of the copyhold eſtate, which can only be ſevered or operated upon by ſurrender. If this joint eſtate had been only a truſt to *Rogers* and *Bonny*, I ſhould have gone a great way to have decreed a ſeverance of the jointure; for between volunteers, any declaration or appointment in writing whatſoever would have ſevered the jointure of the truſt of a copyhold. But beſides, this leaſe and releaſe is imperfect in expreſſion, and does not mention the copyhold eſtate; ſo that if it had been a truſt, equity could not have extended this deed to have included the copyhold eſtate. And therefore as a leaſe and releaſe is a common-law charter, and will not paſs or ſever the legal eſtate of a copyhold; and as the deed is imperfect, ſo as it would not ſever the jointure of the truſt of a copyhold; therefore I am of opinion, that the jointure of the copyhold eſtate is not ſevered. I therefore decree, that the plaintiff *Rogers*, in right of *Martha* his wife, and *Martha* the wife, by virtue of the deeds of leaſe and releaſe, are entitled to one moiety of the freehold eſtate deviſed by the will of the ſaid *Adam Churcher* to *John Rogers* and *Thomas Bonny*; and let it be referred to the Maſter to take an account of the rents and profits of the ſaid freehold eſtate accrued ſince the death of the ſaid *Thomas Bonny*, which have been received by the truſtees or their order, or by any perſon for their uſe; and let one moiety of what ſhall be coming upon the ſaid account be paid to the plaintiffs; and let the ſaid freehold eſtate be equally divided between the plaintiffs and the defendant *John Rogers*; and let a commiſſion iſſue for that purpoſe, and take the uſual directions for iſſuing ſuch commiſſion; and let one moiety of the

(a) 3. Lev. 373.

ſaid

ſaid eſtate be allotted to the plaintiff, and the other moiety to the defendant *John Rogers*; and let them execute conveyances of their reſpective moieties; and let the Maſter ſettle the conveyances, leſt the parties ſhould differ about the ſame, &c. &c.

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Jackſon *againſt* Butler and Spring *(a)*.

Caſe 110.

In Chancery, Eaſter Term, 15. Geo. 2. 1742.

THIS was a bill by the plaintiff in order to have one deed of mortgage delivered to her which the defendant *Butler* got out of her hands as her attorney to get her the money upon it, and which he had pawned to the defendant *Spring* for one hundred pounds; and alſo to have a note of five hundred pounds delivered up to her, or to have an injunction upon it to ſtay all proceedings, upon a ſuggeſtion that it was *a forged note*, and wrote upon a vacant part which was over her name in a letter.

A. gives *B.* a mortgage to receive the money due upon it *B.* pawns it, and *A.* brings his bill: and held a proper remedy; though urged, that an action of *trover* would lie, as in the caſe of plate pawned by a ſervant.

It ſeems, that a defendant is obliged to diſcover and deliver up a note, though forged.

S. C. 2. Atk. 306. Eq. Caſ. Abr. 129. 167. 310.

The plaintiff *Elizabeth* was entitled by deviſe to the real and perſonal eſtate of her uncle *Mr. Lownds*. The defendant *Butler* inſinuated himſelf into her company, and offered to get in the debts of the teſtator *Mr. Lownds*; upon which ſhe delivered to him a mortgage for four hundred pounds due to her uncle *Mr. Lownds* from one *Mr. Richardſon*. The plaintiff pawned this deed for one hundred pounds to *Mr. Spring*, and at the ſame time gave him his own note for one hundred pounds, upon payment of which the mortgage-deed from *Mr. Richardſon* to *Mr. Lownds* was to be re-delivered.

MR. BROWN and MR. MURRAY *for the plaintiff.*

CHUTE and CAPUR *for the defendants.*

HARDWICKE, *Lord Chancellor.* As to *Butler* the caſe is very clear. It appears he was entruſted by the plaintiff with this deed to receive the principal and intereſt from the mortgagor, and he has thought fit to pawn it to *Spring* without any authority. *Butler* has alſo inſiſted upon a note due from the plaintiff to him for five hundred pounds. The plaintiff ſays it is forged. The defendant has made no proof of the conſideration of the note, and has given very different repreſentations of that note; and he does not pretend in his anſwer that anything is due upon the note, but ſays it is loſt; and therefore there muſt be a direction for an injunction to ſtay all actions upon that note, and to reſtrain *Butler* from aſſigning it to other perſons; and I will order him to be examined upon interrogatories as to the cuſtody of that note, and if he has it, that it may be given up.

As to *Spring*, he inſiſts, that this mortgage from *Richardſon* to *Lownds*, belonging to the plaintiff, was in the cuſtody of *Butler*, and was pledged from *Butler* to him upon the loan of one hundred

(*a*) Reg. Lib. A. 1741. fo. 550.

pounds,

JACKSON *againſt* BUTLER AND SPRING.

pounds, as a ſecurity. And the queſtion as to him will be, Whether he can retain his deed againſt the plaintiff until the payment of the one hundred pounds? AND I AM OF OPINION he cannot. That the plaintiff was in poſſeſſion of this deed, and had the ſole property in this deed at firſt, is plain; and that *Butler* acquired no property by the manner the plaintiff delivered it to him, is as plain; and if he had no property, it is undoubtedly true that he could transfer none to *Spring*. And if I ſhould permit *Spring* to retain this deed for one hundred pounds, I ſhould lay down the moſt dangerous rule for the unſettling of property which can be imagined; for the deed being left with *Butler* to receive the money, he does not ſo much as gain a ſpecial property, but has no more than a bare cuſtody; and if he had a right to pawn this deed, and the pawnee a right to retain until payment, it would be highly miſchievous; and it might as well be ſaid, that a gentleman's butler, who has the bare cuſtody of his maſter's plate, and of which he may now commit felony, might pawn them, and retain them againſt the maſter until payment: but it is clear and ſettled, that the pawnee in ſuch caſe gains no property, and the maſter, upon an action of *trover*, will recover againſt him without paying him anything. And if it is ſo in the caſe of plate, much ſtronger in the caſe of deeds; for a man may poſſibly impoſe upon another in plate, becauſe there is often neither arms nor name to diſcover in whom the property is, but deeds have always ſuch characters upon them as will point out the owner. And it appears upon the face of the deed, and alſo from the note which *Butler* gave to *Spring*, that it was a mortgage from *Richardſon* to *Lownds*, to which *Butler prima facie* had no title. Neither did *Butler* enquire, whether he had any title to it, or any authority to pawn; and therefore he muſt anſwer for his indiſcretion. And if a man might retain a deed againſt the proprietor without enquiring into the title of the pawnee and his authority, a perſon who had ſtolen or come unfairly by it, or an attorney or ſolicitor, who indeed have a property to detain a deed until payment of their bills, or their clerks or ſervants, or indeed any perſon who had but the cuſtody of a deed, might pawn it, to the prejudice of the owner; which is inconvenient and abſurd.

It has been urged at the Bar, that an action would lie; and that if there was a remedy at common law, the plaintiff ought not to come here. Suppoſing the plaintiff was to bring *trover*, he could only recover damages, which is a very inadequate remedy; for it is impoſſible to tell what damages a perſon may ſuffer by the having deeds perpetually kept from him; and the proper remedy is in this court, which will decree a re-delivery of the very deeds. And in this court, if it appears that the defendant had ſuch title to the deeds as will defend him in an action of *trover* at law, or has a title ſubject to redemption in the plaintiff, it might fetter them to a court of law. But neither of theſe is the preſent caſe; for as the defendant *Spring* acquired no property upon the pawn, he can have no defence at law.

Wilkinſon

Wilkinſon *againſt* Sterne. Caſe 111.

In Chancery, 5 December, 1743.

HARDWICKE, *Lord Chancellor.* A creditor on ſecurity, and at the ſame time a tenant of an eſtate, ſhall not be obliged, unleſs there is a particular agreement to that purpoſe, to take his debt by dribblets; *id eſt*, to take the overplus of the rent in his hands in part of payment to reduce the principal after deduction of the intereſt due on his debt.

A creditor-tenant not obliged, without ſpecial agreement, to take his debt by dribblets.

Williams *againſt* Williams. Caſe 112.

In Chancery, Eaſter Term, 15. Geo. 2.

ONE *Griffith Williams* made his will, and deviſed all his lands to his ſon *William Williams*, and his heirs, upon the conditions therein and thereafter mentioned, *videlicet*, "to pay all my juſt "debts, and to live with my wife and children for five years." The teſtator then goes on deviſing part of his perſonalty to his ſon and the other part to his wife; and then he goes on and directs, "that his ſon *William* pay to his daughter *Elizabeth* the ſum of "one hundred pounds at the end of five years; to his daughter "*Jane* the ſum of eighty pounds at the end of ſeven; and his ſon "*John* the ſum of ſixty pounds at the end of ten years;" and of this will makes his wife *Margaret* and ſon *William* executors.

A. gave his real eſtate to *B.* and his perſonal to *B.* and *C.* his executors, who proved the will, and acted. *B.* dies; and a bill is brought for a legacy charged upon the real and perſonal eſtate. It is not ſufficient to make the ſurviving executor and *B.*'s heir at law parties, but *B.*'s executor likewiſe; becauſe *B.*'s heir is intereſted in the diſcovery of perſonal eſtate, ſince that is to be firſt applied. And it ſeems to be a rule, that *where a defendant is intereſted in the having another made a defendant, the plaintiff muſt make ſuch a defendant; but where the plaintiff only is affected, he may or may not make ſuch party a defendant, at his pleaſure.*

This will was proved by both *Margaret* and *William*; but *William* intermeddled moſt with the perſonal eſtate; and then died, making an executor.

This bill was brought by *Elizabeth*, *Jane*, and *John Williams*, children of the ſaid *Griffith* the teſtator, in order to have a ſatisfaction for their legacies, in the firſt place, out of the perſonal eſtate, and if that is deficient out of the real eſtate. To this bill they have only made *Margaret*, the ſurviving executor of *Griffith*, a defendant, and have not the repreſentative of *William* before the Court, but only his heir at law.

And it was objected, that as the bill prays an account of the perſonal eſtate of *Griffith* the teſtator, not only his ſurviving executor, but alſo the repreſentative of the deceaſed one, ought to be before the Court; and that there was a defect of parties.

HARDWICKE, *Lord Chancellor.* Where a plaintiff is only concerned in intereſt, there he may waive ſuch demand, and omit making the party a defendant to his bill. But here the defendants themſelves are intereſted in the having *William*'s executor before the Court; for it is brought by the legatees to have payment, in the firſt place, out of the perſonal eſtate, and if that is deficient to charge the real eſtate; and for that purpoſe they have made the heirs at law parties. Now the heirs at law have an intereſt in having

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having *William*'s executor before the Court, that there may be a complete account of the perſonal eſtate; and to have that applied, in the firſt place, in diſcharge and eaſe of the inheritance. Therefore I am of opinion, if the perſonal and real eſtate are liable, as the caſe is opened to me, that there is a defect of parties.

MR. WILBRAHAM. As the ſurviving executor is made party, it is ſufficient; for ſhe may be chargeable with the whole perſonal eſtate, and have a remedy by bill againſt the repreſentative of the deceaſed executor for what came to his hands.

HARDWICKE, *Lord Chancellor*. There are caſes where the making a ſurviving executor only defendant will be ſufficient; but where you want parties before the Court to have a complete account, there you muſt have all the executors, or the repreſentatives of every executor before the Court, for each executor may poſſeſs ſome diſtinct part of the perſonal eſtate, though you are not obliged to purſue the perſonal eſtate into the hands of ſtrangers, and to make them defendants. Suppoſe there are two executors, and both have adminiſtered; as they may each of them by law get in diſtinct parts of the perſonal eſtate, and as each of them is anſwerable only for ſuch part as comes to his hands, if one die, it is neceſſary that his repreſentative be made a party to the account. Therefore there is a defect of parties.

MR. BROWN and MR. ROBINSON then inſiſted, that the perſonal eſtate in this caſe is not liable to theſe legacies, but only the real eſtate in the hands of *William Williams*; and then, as we have his heir before the Court, we have proper parties, and the prayer of the bill, as to the account of the perſonal eſtate, muſt be diſmiſſed.

MR. ATTORNEY-GENERAL and MR. WILBRAHAM and MR. WELDON *to the contrary*. It is inſiſted, that theſe legacies deviſed to the plaintiffs are not to come out of the perſonal eſtate, and that for ſeveral reaſons: as, that there is no expreſs charge upon the perſonal eſtate; that they are not bequeathed by the general name of legacies; that the perſonal eſtate was not intended to be charged, becauſe it is ſpecifically deviſed away, part to the ſon, and a part to the mother. But then the plaintiffs muſt prove, that this is chargeable on the real eſtate; and in order to this they ſay, that this is payable by the deviſee of the real eſtate, and that the real eſtate was deviſed upon condition to pay theſe fortunes; but it is not ſo, for the condition is to pay his debts, and to live with his wife for five years, &c. And as there are no expreſs words to charge the real eſtate, it ought not to be charged by implication.

HARDWICKE, *Lord Chancellor*. In the preſent caſe, there is no doubt but that, in one degree or other, the real eſtate is chargeable either, in the firſt place, in the hands of the deviſee of the real eſtate, *William Williams*; or, ſecondly, in his hands in caſe the perſonalty ſhould be defective. *The plaintiff* inſiſts, the

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real eſtate is liable: *The defendant*, that the perſonal eſtate given to the ſon is liable, and that the real eſtate is only ſubject in default of perſonalty. AND I AM OF OPINION, that part of the perſonal eſtate given to the mother is not liable; for theſe fortunes to the plaintiffs are not given as general legacies, but only as *William* the ſon is deviſee of the real eſtate. But ſuppoſe both the real and perſonal eſtate in the hands of the ſon had been liable, but not the perſonal eſtate deviſed to the mother; and ſuppoſe the ſon living, could he upon this bill have inſiſted, that there ſhould be firſt an account of the perſonal eſtate? No; for it would be a vain thing, as he has both funds in him; and it is not material out of which fund the money is paid, whether real or perſonal eſtate. Indeed, where two perſons are entitled, one to the perſonal eſtate, and the other to the real; or if there had been deviſee for life, remainder in tail, the Court could not do juſtice to the perſon who has the real eſtate in the firſt caſe, nor to the remainder-man in the ſecond, without an account of the perſonal eſtate in the firſt place in eaſe and relief of the real eſtate.

Here appears a plain intention to charge the fund of the real eſtate only; for he gives his lands to his ſon *William* in fee, upon the conditions therein and thereafter mentioned, *videlicet*, "that he "pay my debts, and live with my wife and children for five years." After this, theſe following ſeveral bequeſts of the perſonal eſtate ſpecifically: Such and ſuch things, by name, to the ſon, and ſuch and ſuch things to his wife: and then there follows a direction, that the ſon *William* pay a hundred pounds to one child, eighty pounds to another, and ſixty pounds to another, payable however at diſtant times. It is inſiſted for the defendants, that the conditions annexed to the deviſe muſt be taken to be thoſe only which immediately follow it. BUT I AM OF A DIFFERENT OPINION, for the whole of a will muſt be taken together; and all a man's directions cannot be given together, but muſt be ſucceſſive, and follow one another; and if a man put his thoughts and directions in an improper order and ſucceſſion, yet the Court will marſhal them; and in this caſe the directions to pay the fortunes to the children are part of the terms upon which he has given the real eſtate to the ſon, notwithſtanding they are ſeparated from one another by the intervening bequeſt of the perſonal eſtate.

And this conſtruction, that the real eſtate is chargeable, is ſo fortified upon the times of payment, ſome being at the end of five, ſome at ſeven, and others at ten years. This was to give time to *William* to pay them out of a fund which was continually producing ſomething by annual profits.

And therefore as to the parties you may go on.

Bell

Caſe 113. Bell *againſt* Howard and Others (*a*).

In Chancery, Eaſter Term, 15. Geo. 2.

If a father who is poſſeſſed of an advowſon; which he apparently deſigned for his ſon, be prevailed on, when in an infirm ſtate of mind, to enter into articles for the ſale of it to another perſon, a court of equity will not compel a ſpecific performance, although there is no impoſition or fraud imputable to the purchaſor.

2. Vezey, 155. 3. Bro. C.C. 95.

HARDWICKE, *Lord Chancellor.* This is a bill brought by *Mr. Bell* to have a *ſpecific performance* of articles for the ſale of an advowſon, brought particularly againſt *Mr. Howard*, the eldeſt ſon and heir at law of *Mr. Charles Francis Howard*, who entered into the articles.

But there are ſo many objections againſt decreeing a ſpecific execution of them, that if ever there was a caſe for the Court to exerciſe its diſcretion in refuſing to decree a performance, and in leaving the party to his remedy at law, theſe are ſurely one of thoſe caſes. I do not mean as to any unfair practices in *Mr. Bell* the plaintiff, for there is no impoſition or fraud charged upon him. But in relation to the circumſtances in which *Mr. Howard* entered into theſe articles, this Court cannot decree a ſpecific performance; and if the caſe be conſidered upon all the parts of it, *viz.* the terms of the articles, the circumſtances and condition the ſeller was in, and the manner of making him execute them, the decree will be very plain.

As to the circumſtances: Here a gentleman of a good family, but ſmall eſtate, has a great many children, I think five, greatly in debt, and of broken circumſtances, after having lived twenty years with his wife, is prevailed upon by *Mrs. Norton* his ſervant, and who is one of the defendants, to turn his children out of doors, and to live with this woman, who had the abſolute command of his perſon and property. After he was in theſe circumſtances, it is clear, by all the witneſſes, that he habituated himſelf to drinking to an exceſſive degree, by which he impaired his ſenſes and conſtitution; and the witneſſes ſpoke to the natural account of what was the occaſion of that drinking, that he did it to drive away reflections which he could not bear. In theſe circumſtances, he is very near his end at the time theſe articles were executed, for they are executed on the ſeventeenth of *February* 1735, and upon the nineteenth in the morning he dies. It was mentioned at firſt as though he was inſane or *non compos*; but I do not conſider him to have been in that ſtate which the law calls *non compos*, but he was, to be ſure, very weak, and liable to be impoſed upon, eſpecially by this woman, who had an influence over him. It appears, that during his beſt ſtate of mind, and in his ſober intervals, he had an intention to preſerve this advowſon for his ſon, which was a very prudent thing; for as his fortune was ſo much incumbered, he could not do a more beneficial thing for his ſon than to give him a living of about two hundred pounds or three hundred pounds a-year.

(*a*) In the original manuſcript from which theſe Caſes were taken, it is ſaid, in the margin of this caſe, "See *my* Eq. Abr. 16. 19. 333." And for the ſuppoſed author of this Abridgment, ſee 21. Viner. Abr. 489. *notis.* 5. Viner. Abr. 408. *notis.*

It

It appears, that he had often drank his ſon's health by the name of the young Parſon of *Elſdon*.

Under this ſtate of health and mind *(a)* it is that *Mr. Howard* intends to ſell this advowſon; and how is this brought about? *Mr. Dawſon*, who is a bailiff or ſerjeant at mace, and keeps an alehouſe at *Newcaſtle*, comes to hunt with *Mr. Howard*, and it is of him *Mr. Howard* deſires a purchaſer may be found out. *Mr. Dawſon* looks out, but does not get one till *February* 17, 1735, and then there comes a letter from *Mrs. Norton*, and not from *Mr. Howard*, wherein ſhe ſays, the price is fixed at eight hundred pounds, and hopes his friend is in earneſt. She ſays, *Mr. Howard* had taken phyſick, or would have wrote himſelf. *Mr. Dawſon* then ſets further to work, and makes the propoſal to the plaintiff, who accepts it on the terms of eight hundred pounds; and then articles are prepared without conſulting *Mr. Howard*, and executed by *Mr. Bell* firſt, without carrying them firſt to *Mr. Howard*. The articles are brought to *Mr. Howard* late at night; and when they were produced he ſeemed ſatisfied, and owned the letter wrote by *Mrs. Norton* by his command; but it is proved by *Mr. Howard*'s daughter, who was about ſeventeen years of age at the time of the execution, and at that age a woman is able to give an account of a fact as well as an elder perſon, for young people are more apt to ſpeak the truth than thoſe who are grown cunning by age. She ſwears, that when *Mrs. Norton* came into the room to acquaint her father that *Mr. Dawſon* was come to agree for the advowſon, that he anſwered, he was ſo ſick in body and mind he would not do it, and was incapable of buſineſs; but *Mrs. Norton* then ſwore, that "by God it ſhould be done, and that ſhe would not ſtarve for "any of them;" that the articles were then read to him, and it was inſiſted that he ſhould ſign them; but he ſaid, he was ſo ſick that he could not do it; upon which a pen was put into his hand, and he then executed. She ſwears, that ſhe believed him to be incapable of buſineſs, for he had been ſubject about that times to ſeveral fits, which deprived him of ſenſe; and that he had one ſuch about half-an-hour before; and that *Mrs. Norton* the ſame day had given him ſtrong liquors; that ſhe had frequently heard her father declare, that he would not ſell the living, but would keep it for his ſon.

It ſeems, that *Mrs. Norton* over-ruled him to ſell this advowſon. But it is ſaid, it is not the intereſt of *Mrs. Norton* to ſell it; for, in the firſt place, ſhe had obtained a will, whereby ſhe was entitled to this advowſon, and that it was not liable to debts; and although the will was revoked by a ſubſequent ſettlement, yet ſhe did not know ſo much law as to be ſenſible of that. Yet notwithſtanding this agreement, creatures like *Mrs. Norton* might think it better to have the command of ready money, for that is what they can

(a) In what caſes a court of equity will ſet aſide a conveyance obtained from a perſon of a weak mind, &c.—ſee White *v.* Small, 2 Chan. Caſes, 103. Clarkſon *v.* Hanway, 2. Peer. Wms. 203. James *v.* Greaves, 2. Peer. Wms 270. Evans *v.* Blood, 4. Cro. P. C. 557. Bennet *v.* Vade, poſt. S. C. 2. Atk. 324.

beſt

BELL *againſt* HOWARD AND OTHERS.

beſt deal with, and that they can conceal; and ſhe might be afraid this advowſon was ſettled, or liable to debts.

As to the terms of the articles: They are ſuch as are not mutual, but only obligatory on one party; for *Mr. Bell* is not bound by them unleſs he pleaſes. The firſt covenant is, that *Mr. Howard*, in conſideration of a guinea paid in hand, upon the requeſt and at the proper coſts of *Mr. Bell*, ſhall execute a conveyance of this advowſon; and the covenant on the part of *Mr. Bell* is, that he will pay the purchaſe-money, if his Counſel approve of *Mr. Howard*'s title in the premiſes. I am not clear there would have been any right in *Mr. Howard* to have compelled an execution of theſe articles, it being at the requeſt of *Mr. Bell*; and unleſs he requeſted the ſale, it was not to be. But ſuppoſing the requeſt to be formal only, yet the articles are only to be executed if the Counſel of *Mr. Bell* ſhall approve of the title. This is not the uſual clauſe; for that is, if the title be approved by Counſel, generally. And it is plain, in the preſent caſe, that *Mr. Bell*'s Counſel could not approve of the title; for this very advowſon is among other lands included in a collateral ſecurity, which is to continue for ever, to indemnify *Mr. Ward*, a purchaſor of another eſtate of *Mr. Howard*'s; and *Mr. Bell* could not have a good and ſafe ſale of this advowſon, unleſs *Mr. Ward* would join in the conveyance. And could any Counſel adviſe a purchaſe with ſuch a perpetual incumbrance? No; for if different eſtates are compriſed in a collateral ſecurity to indemnify a purchaſor and his heirs, and a perſon purchaſes part of ſuch compriſed lands without notice of ſuch ſecurity, and a bill is brought againſt him by the perſon who is intitled to the benefit of the collateral ſecurity, to be ſatisfied out of the lands purchaſed, this Court will turn the plaintiff about to the remaining part of the eſtate in the collateral ſecurity, to be indemnified out of them: but if thoſe eſtates are not ſufficient, or there are no other lands contained in the collateral ſecurity, he will be intitled againſt the purchaſor for valuable conſideration, and without notice; for the land itſelf is charged. Beſides, theſe articles are executed in 1735, and no bill brought till *October* 1739, four years after; and it happens very providentially, that *Mr. Hugh Farr* the incumbent dies in *September* 1739, who was a good life, and as likely to live as anybody; and this advowſon being fallen in is the occaſion of this bill; and now *Mr. Bell* ſubmits to buy the advowſon, ſubject to the collateral ſecurity. The reaſon of the plaintiff's deferring his bill was, becauſe he could not tell who was *Mr. Howard*'s heir at law to make a defendant to his bill, becauſe there was a cauſe depending between *Mrs. Norton* and the widow of *Mr. Howard*, wherein the legitimacy of *Mr. Howard* the ſon was diſputed. But that could not be the reaſon, for that cauſe was not determined till ſix months after the filing the preſent bill; and that would not have hindered him, for he might have made them all parties.

There

There is another objection againſt decreeing an execution of theſe articles, which is, that *Mr. Bell* has waived theſe articles. Now it is certain, that an intereſt in land cannot be parted with or waived by naked parol without writing; yet articles may by parol be ſo far waived, that if the party come into this court to have a ſpecific execution of them, ſuch parol waivor will rebut the equity which the party before had, and prevent this Court from executing them ſpecifically. And *Mr. Bell* acted the part of a very good chancellor when he declared, that if the iſſue at law went for *Mr. Howard* againſt *Mrs. Norton*, he would give up his articles to *Mr. Howard* the ſon; but if the iſſue went for *Mrs. Norton*, he would inſiſt upon the benefit of them againſt her: it was quite juſt, for ſhe was the inſtrument in bringing theſe articles about. The iſſue was for *Mrs. Howard*. Therefore for the above, the plaintiff muſt be left to his remedy at law againſt the heir at law, if there be aſſets; for the covenant charges the heirs. The bill was accordingly diſmiſſed (*a*).

BELL *againſt* HOWARD AND OTHERS.

(*a*, See Buxton *v.* Liſter, 3. Atk. 383. Savage *v.* Taylor, Caſes T. T. 234. Goring *v.* Naſh, 3. Atk. 180.

Woodcroft *againſt* Kynaſton. Caſe 114.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

HARDWICKE, *Lord Chancellor*. This is a motion either to quaſh or ſuperſede a writ of *certiorari* iſſued out of this court, and directed "To the mayor and ſheriffs of *London*," in order to move a *replevin* depending in THE MAYOR'S COURT of *London*: the writ is *teſted* the ninth of *February*, and returnable in fifteen days after *Eaſter* into this court, ſo that it is not returned yet; and if it is, to remove the tenor of the record and proceſs, and not to remove the record itſelf. The objections, as the ground to quaſh or ſuperſede this *certiorari*, are two: THE FIRST, that it is made returnable into this court, whereas it ſhould be returned either into the court of king's bench or common pleas immediately; and it is ſaid, that the admitting writs of this kind to be returnable in this court would introduce vaſt delay; for when the record is returned here, it muſt be ſent formally by *mittimus* into the common-law court. THE SECOND OBJECTION is, that ſuppoſing this *certiorari* may iſſue out of and be returnable into this court, yet in the preſent caſe it has iſſued erroneouſly; for it is not to return the record and proceſs itſelf, but only a tenor of it.

A *certiorari* may be returned in chancery, and ſent to the king's bench or common pleas by *mittimus*, or it may be returned immediately into thoſe courts.

S. C. 2. Atk. 317.

As to THE FIRST OBJECTION, that ſuch *certiorari* ought not to iſſue returnable in this court, but into ſome court of law, though I do foreſee that a proceeding of this kind is liable to delay, and to be avoided if poſſible; yet I am of opinion, that the writ, as to that error, is a good writ. In the caſe of actions in replevin, there

Replevins may be removed out of inferior into ſuperior courts. In the county court, which is not a court of record, by *pone* or *recordari*; but not by the defendant without cauſe.

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are ſeveral ways to remove them out of inferior into ſuperior courts.

In THE COUNTY COURT, which is not a court of record, it is to be removed by *pone* or *recordari*, either at the inſtance of the plaintiff or defendant. The plaintiff may remove the action without cauſe, becauſe it is his own ſuit; but the defendant cannot do it without cauſe, becauſe it tends to the delay of the plaintiff. In the hundred court, or in the court of any private lord, which likewiſe are not courts of record, actions are to be removed by an *accedas ad Curiam*, but not without cauſe by the plaintiff or the defendant, becauſe ſuch removal tends to the prejudice of the profits of the lord out of whoſe court the cauſe is removed. All theſe three methods are to remove actions out of courts which are not of record. But in replevins in courts of records they cannot be removed by any of the ſaid three writs, but they muſt be removed by *certiorari*; for there is no other method of removing records out of courts of record but by writ of error after judgment, and by *certiorari* before. And records may be removed either by *certiorari* out of this court or the king's bench; and there are precedents to prove both, *Treaſurer's Brev.* 77. And as a *certiorari* may either iſſue out of this court or the king's bench, ſo it may iſſue out of this court, and be made returnable either into this court, the court of king's bench, or common pleas. *F. N. B.* 554. the new quarto edition, and of the *Old Edition*, 245. where it is ſaid, that the writ of *certiorari* is an original writ, and iſſues ſometimes out of the chancery, and ſometimes out of the king's bench, and lieth where the king would be certified of any record, which is in the treaſury, or in the common pleas, or in any other court of record. Then the king may ſend this writ of *certiorari* to any of the pleas, or in any other court of record. Then the king may ſend this writ of *certiorari* to any of the ſaid courts or offices to certify ſuch record before him *in banco*, or in the chancery, or *before other juſtices* wherever the king pleaſes to have the ſame certified. This is the law in this caſe. As to the delay; theſe proceedings by *certiorari* are liable to that, and at common law they were liable to great delay; and therefore the court of king's bench has made a rule to expedite the payment of coſts in a *certiorari* iſſuing out of that court. And it would be very neceſſary, in conformity to them, to make ſome rule here to ſpeed theſe proceedings, and that ſome ſhort time may be fixed for a *procedendo* to go of courſe. I had the Curſitor with me, who told me, when the defendant had a mind to delay the plaintiff, he applied to this court for a *certiorari* returnable in this court; for then it would require ſome time to have it ſent into the king's bench or common pleas by *mittimus*. And beſides, the proceedings in replevin are more liable to delays than other actions; for there is firſt of all a bond given to the ſheriff for a return, if there ſhall be judgment againſt the plaintiff; and if there be judgment in favour of the defendant, he may proceed upon the bond, which is a new action, or he may have a writ of *retorno habendo*, and turn the plaintiff round that way; and if an *elongatur* be returned, there is only a proceeding by

In the hundred court, or court of any private lord, not of record, by *accedas ad curiam*; but not either by plaintiff or defendant without cauſe.

No method of removing proceedings out of courts of record but by *certiorari* before judgment or writ of error after.

Proceedings on replevin.

by a *capias in withernam*. Therefore as to the delay which will be cauſed by having the *certiorari* made returnable into this court, I cannot quaſh or ſuperſede it for that, as there are precedents to ſupport; and all proceedings in replevin are liable to delay.

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THE SECOND EXCEPTION is, that this *certiorari* is erroneous or bad, becauſe it is not to remove the very record and proceſs, but the tenor of them only. And upon this objection I AM OF OPINION, that this writ ought either to be ſuperſeded or quaſhed; for I think it ſhould be to remove the record itſelf. There is a great difference between the record itſelf and the tenor of it; for the tenor is only a tranſcript or copy of a record, although it muſt be a *verbatim* or literal one; and it has been determined in the caſe of libels, that *cujus tenor ſequitur, &c.* muſt be literal, and comprehend the very words themſelves. And as this writ of *certiorari* in the preſent caſe is to remove a cauſe of action out of an inferior court to be proceeded upon in a ſuperior one, it ought to remove the record itſelf, for no proceedings can be upon the tenor. What would be the conſequence? A defect of juſtice; for by this means there could be no proceedings either in the court above or below; not in the court above, becauſe it has only a tenor of the record, and not the record itſelf, before them; yet a *certiorari* cloſes their hands, and ſuperſedes all their proceedings. And there is a difference between a *certiorari* and a *habeas corpus*; the latter may return the body into a ſuperior court, with the cauſe of detention, without returning any record of the inferior court; becauſe when the body and cauſe are returned into a court of ſuperior juriſdiction, you begin and declare *de novo*; but where a cauſe is returned by *certiorari*, you proceed upon it in the ſame ſtate it was in the court below, which you cannot do without ſeeing how it ſtands upon the record itſelf.

Certiorari muſt be to remove the record itſelf, where the action commenced in the inferior court is to be proceeded upon. But where an action in an inferior court is brought on a judgment in a ſuperior, and *nul tiel record* pleaded, a *certiorari* to remove the tenor of the record is ſufficient.

This preſent *certiorari* has been framed by a *certiorari* for another purpoſe; for in ſome caſes it is enough to remove the bare tenor of a record; and from ſuch precedent the preſent *certiorari* has been drawn: as if an action be brought in an inferior court upon a judgment obtained in a ſuperior one, as it well may, and *nul tiel record* be pleaded, the court below cannot have this record but by *certiorari* out of this court; but in thoſe caſes which the tenor of the record will do for, they do not want the record itſelf, but only an evidence that there was ſuch a judgment in the court of record above, by an authentic copy under the ſeal of the court: but when a cauſe is removed out of an inferior into a ſuperior court, to be proceeded upon there, you muſt neceſſarily have the record itſelf; and if the *certiorari* direct only the tenor of the record to be returned, it will be erroneous. In *Fitzherbert* (*a*), and in the Commentary or Notes upon the New Edition (*b*), which notes are ſaid to be LORD HALE'S, and it is very probable from their great learning and accuracy that they are his, it is contained thus:

(*a*) Fitz. Nat. Brev. 242. (*b*) Hale's edit. F. N. B. 548.

WOODCROFT *against* KYNASTON.

" If one brings debt on a recovery in an inferior court, as in a " court of piepowders, &c. there it is not neceſſary for the party " to have the record itſelf (that is a *profert in Cur.*) or the tenor " of it. So if one brings debt in the common pleas on damages " recovered in the king's bench, or in the court of *Norwich*. But if " *nul tiel record* be pleaded in the court below, it is ſufficient if the " tenor of the record be removed by *certiorari* into chancery, and " ſent thence by *mittimus* (*a*); but where one is to ſue execution of " record of another court, as where it is to ſue execution in " common pleas on a recovery in an *antient demeſne*, or before " juſtices of aſſize, or *oyer* and *terminer*, there the record itſelf " ought to be removed, &c. and no execution can be on the tenor " of a record." 24. *Ed.* 3. 79. So there is a difference where you only want evidence of a record and where you are to proceed upon it, whether as to a declaration, plea, or as to taking out execution.

In *The Regiſter*, 288. *b.* there is a precedent of a *certiorari* to remove the record and proceſs in a judgment in aſſize of *novel diſſeiſin*, and which was ſent by *mittimus* into the common pleas; and it is not *tenorem*, but *proceſſum et recordum*.

To the point of returning the record, or only the tenor of it, there are two caſes in *Salkeld*. In the firſt (*b*), HOLT, *Chief Juſtice*, ſays, " It is an error in the clerks in *London*, that upon a " *certiorari* they return only a tranſcript, as if the record remained " below; for in the common pleas, though they do not return the " very individual record, yet the tranſcript is returned as if it was " the record; and ſo it is in judgment of law." In the ſecond (*c*), on a *certiorari* to return an order, it was returned, " *cujus quidem* " *tenor ſequitur in hæc verba*," and not " *qui quidem ordo ſequi-* " *tur*;" and it was quaſhed to this reaſon.

Upon all theſe authorities and theſe reaſons I AM OF OPINION, that this writ of *certiorari* is erroneous: and

Then ANOTHER QUESTION grows, Whether it is to be quaſhed or ſuperſeded? And I cannot quaſh it, becauſe no writ can be quaſhed but when it is returned and appears defective upon the record; but the preſent *certiorari* is not returned yet, ſo not appearing upon record.

Writs, when to be ſuperſeded, and when quaſhed.

In the caſe of *Sir John Sharpe v. Mayor of London* (*d*), upon a writ of *mandamus*, a *mandamus* was taken out directed " To the " mayor, &c. of *London*," by their corporate names; it was moved to quaſh it, upon a miſdirection or miſtake in the corporate name; and after it had been ſolemnly argued, the Judges delivered their opinions *ſeriatim*; and the Court was divided; but when the

(*a*) See Year-Books 7. *Hen.* 6. pl. 19. 19. *Hen.* 6. pl. 78, 79, 80.

(*b*) Rex v. North, 2. Salk. 565. 6. Mod. 188.

(*c*) The Queen v. the Pariſh of St. Mary in the Devizes, 1. Salk. 147.—See alſo 2. Hawk. P. C. c. 27. ſ. 76.

(*d*) Gilbert, 255.

cauſe

ſauſe came to be argued by the Bench, MR. JUSTICE EYRE ſaid, they could not quaſh the writ, becauſe it was returned and before the Court; and that they could only quaſh a writ upon a defect appearing upon the record; and that the rule muſt be to ſuperſede this writ. And though the Court differed as to the point of miſdirection, yet they all agreed that they were to ſuperſede and not to quaſh the writ. WOODCROFT *againſt* KYNASTON.

So this *certiorari* muſt be ſuperſeded.

Weſton *againſt* Bowes. Caſe 115.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

ELIZABETH THURLAND by deed, reciting her marriage-ſettlement, whereby ſhe had power to diſpoſe of her landed eſtate in the manner ſhe ſhould think fit, notwithſtanding her coverture, in conſideration of her value and affection for her huſband, appoints, that her truſtees ſhould ſtand ſeiſed of the lands comprized in her marriage-ſettlement to the uſe of her huſband and his heirs, ſubject to ſeveral annuities in fee; one of which, for twenty pounds a-year, was given to the plaintiff. Theſe annuities were given generally, and not made payable from any ſpecial time: and then in the ſame deed of appointment ſhe gives ſeveral groſs ſums in charity to the poor of ſeveral pariſhes, payable to the churchwardens within three years after her deceaſe. Power. *Feme Covert.*

This bill was brought againſt the executors of the huſband for arrears of the twenty pounds annuity incurred during the huſband's life, without making the heir at law a party; and this was held ſufficient for the arrears during the teſtator's life; but for any arrears after the huſband's death which charges the heir, he muſt be made a party.

MR. WILBRAHAM and MR. EVANS *for the plaintiff* ſaid, the queſtion was, Whether the preſent annuity ſhould commence from the execution or date of the appointment from the time of the appointee's death, or not till three years after her death? The annuities were appointed generally, but afterwards, in the ſame appointment, there are ſeveral charities given, not to be paid, however, till three years after the death of the appointer; but theſe charities are ſums in groſs of as different a nature as poſſible from the preſent demand, contained too in a diſtinct independent clauſe; and ſo this clauſe of the charities cannot be conſtrued into the clauſe of the annuities, being of a different nature; and theſe annuities cannot take their commencement from the deceaſe of the appointer, for there are no words which purport that; but they muſt commence from the execution of the deed: as if a leaſe of land be made generally, without aſſigning any commencement to it, it ſhall commence immediately; and as the huſband's eſtate in the land commences immediately, Why ſhould not the annuities charged upon his land do ſo too? The defendants ſay, that this

WESTON *against* BOWLS.

appointment being made ſo long ago as 1713, and no bill filed till 1736, the plaintiff is barred by his long acquieſcence under the ſtatute of Limitations; but this annuity is a truſt, and payable by deed, and ſo not within the ſtatute.

HARDWICKE, *Lord Chancellor.* The deed which created this annuity was executed in 1713, by which an appointment was made of an eſtate under a power by a wife in favour of her huſband; and it is an appointment of a legal eſtate, and not of a truſt, as has been argued; for ſhe appoints the truſtees who ſtood ſeiſed to her uſe to ſtand ſeiſed to the uſe of her huſband in fee, which is a conveyance of the legal eſtate; and ſhe by the ſame deed has made this eſtate liable to theſe annuities; as to the commencement of which it ſeems to be her intent that they ſhould not commence till after her death; for it ſeems an extraordinary thing, that ſhe who has land at preſent in her hands, without any charge upon it, ſhould make it liable to annuities to her relations immediately, when her huſband and ſhe might have children; but whatever her intent was, as ſhe has not expreſſed when they ſhall begin, the law will raiſe a commencement for her, *viz.* from the execution of the deed. And as to its being argued, that theſe annuities are to be paid three years after her death, thoſe words in the appointment are ſo relative as to be applicable only to the groſs ſums in charity.

The queſtion is, then, Whether the plaintiff can have any demand in a court of equity againſt an executor in 1736, when the bill was filed upon an annuity created and due by a deed in 1713? This, to be ſure, is an unfavourable demand after this length of time, and has a commencement againſt the intent of the parties: and this is no truſt, for the appointment is a grant of the legal eſtate; for in the appointment ſhe "limits and appoints," which amounts to a grant, and is equal to any ſolemn conveyance. The preſent demand is either a rent-charge or a rent-ſeck, and more naturally a rent-ſeck, as there is no power of diſtreſs annexed to it; and it is not an annuity, for it is iſſuing out of land, and nobody's perſon charged; and here the huſband has been in poſſeſſion of the land charged, and has not paid the rent-ſeck any-time during his life, which was for ſeveral years; nor has the plaintiff taken any legal remedy againſt the land, but comes into this court againſt the repreſentatives of the party. If you were to take your remedy upon the land for theſe arrears, and it had ſo happened that the wife had appointed the land to remain over after the death of the huſband, that indeed might create a queſtion between the remainder-man and the executors or perſonal repreſentatives of the huſband, Whether the remainder-man ſhould not have an account of the perſonal eſtate, and ſatisfaction for the arrears of the rent unpaid by the huſband during his particular eſtate? but that is entirely upon another equity, for it is to exonerate the remainder from what it would be unnatural to charge it with. But in the preſent caſe, this demand of the arrears is no perſonal charge, or a charge againſt the executors, either in law or equity. But ſuppoſing you could

could come upon the perſonal eſtate of the huſband, you cannot do it by force of this deed of appointment to take it out of the ſtatute of Limitations; for by this deed there is nothing done by the huſband to charge his executors, for he neither covenants nor grants. If then you cannot charge him or his executors by this deed, you then can only do it by his receipt of the rents and profits, which is in the nature of a perſonal charge, and within the ſtatute of Limitations; and you are then barred by length of time, for it has been ſhewn before that it is no truſt; and you cannot make any perſonal demand by virtue of the deed of appointment to take this claim out of the ſtatute of Limitations.

Weston *againſt* Bowes.

The bill was accordingly diſmiſſed.

Ward *againſt* Henzel and Others.

Caſe 116.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

A bill brought by a perſon as *lay-impropriator* of tithes for an account of tithes; but the bill diſmiſſed.

THIS was a bill brought by the plaintiff, as a lay-impropriator of the tithes of the pariſh of *Darlington*, againſt *Mr. Thorpe*, as rector of the pariſh of *Oulton*, who has received the tithes demanded by the bill, and againſt *Henzel* the defendant and nineteen others, occupiers of the tithe lands, to have an account of the tithes; and that *Mr. Thorpe* might ſet out his title to the tithes, and to what value he had received.

The plaintiff in his bill ſets out, that he is impropriator of the tithes of the townſhip of *Cockerton*, in the pariſh of *Darlington*, by an original grant from *Henry the Eighth*, after the diſſolution of the body to which it belonged, being the deanery and collegiate church of *Durham*; that by intermediate grants the tithes came to ſome of his anceſtors in *King James the Firſt*'s time, and ſhews his pedigree; that the tithes in diſpute ariſe out of a place called *Grange-Cloſe*, in the ſame townſhip of *Cockerton*. But the plaintiff does not prove any receipt of tithes by himſelf or any of his anceſtors.

The defendants admit themſelves to be owners and occupiers of *Grange-Cloſe*; but that for ſeveral years paſt they have paid their tithes to the defendant *Mr. Thorpe*, and that the plaintiff muſt ſeek his remedy againſt *Mr. Thorpe*.

The defendant *Mr. Thorpe*, in his anſwer, admits the plaintiff to have ſome eſtate in the tithes of the townſhip of *Cockerton*, but denies his right to the tithes in *Grange-Cloſe*, although it lies in the townſhip of *Cockerton* and the pariſh of *Darlington*; that he, the defendant, is rector of *Oulton*; and that his predeceſſors have been always entitled to the tithes in *Grange-Cloſe*: and he admits, that *Grange-Cloſe* lies in the townſhip of *Cockerton*; and that it is in the pariſh of *Darlington*.

Mr. Clarke *for the plaintiff*. The plaintiff is intitled as an impropriator of the tithes of the townſhip of *Cockerton*, in which

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place the tithes in queſtion ariſe, and as impropriator of a townſhip he is entitled by common right to all the tithes within that diſtrict, for all right of ſpiritual perſons ceaſes. Beſides, the right of *Thorpe*, the defendant, is a very particular one; for he is rector of another pariſh than where the tithes lie, entirely diſtinct from it; nor were any aſſeſſments or duties ever paid by the pariſh of *Oulton* to the pariſh of *Darlington*, nor does it appear that *Thorpe* performs any offices of divine ſervice in *Darlington*; for if there was any immemorial cuſtom that the parſons of *Oulton* did any duties in the pariſh of *Darlington*, this property in the tithes in another pariſh might be good upon ſuch a valuable commencement.

The deeds were read and the patent.

And then HARDWICKE, *Lord Chancellor*, ſaid, The plaintiff *Mr. Ward* is not impropriator of the tithes in the townſhip of *Cockerton*; and if he was, it would be neceſſary for him to give evidence of a receipt of the tithes, either to himſelf or ſome of his anceſtors; but this evidence is againſt him, for the receipt of the tithes is proved in the defendant *Thorpe* or ſome of his anceſtors. It is true, if there be an impropriator, whether eccleſiaſtical or lay, he is intitled to all tithes of common right, and is not put to prove his title; but the perſons who claim right againſt him muſt ſhew their right by deed, if they are occupiers of the land only; but the rector may prove his title by an antient receipt and perception of tithes, and it ſhall be preſumed upon ſuch evidence, that there is an endowment of the parſon of *Oulton* of theſe tithes, which endowment needs not be ſhewn by deed, for immemorial receipt of the tithes is evidence enough of it. There is no pretence for the bill; for ſuch bills would overturn almoſt all the titles of tithes in the kingdom.

Therefore the bill muſt be diſmiſſed.

Caſe 117. Bennett and his Wife and Spencer and his Wife *againſt* Vade and ſeveral Others (*a*).

In Chancery, Trinity Term, 15. & 16. *Geo.* 2. 1742.

In what caſes a court of equity will ſet aſide a conveyance, for fraud, impoſition, and undue influence.

THE LORD CHANCELLOR, after taking three or four days to review the evidence in this cauſe (which had taken four days in argument, the eſtate being of the yearly value of twenty-five hundred pounds), delivered his opinion in a very ſolemn manner to this effect:

S. C. 2 Atk. 324. 487. 529.

THIS CAUSE is brought before the Court upon two bills. The original one is brought by *Mr. Bennett* and his wife and *Mr. Spencer* and his wife, as the two wives are couſin-germans, and next-of-kin and coheirs at law of *Sir John Leigh*, of *Adington*, in the county of *Surrey*; and it is to ſet aſide a will and a ſettlement

(*a*) Reg. Lib. A. 1741. fo. 515.

obtained

obtained from him a little before his death by impoſition on his weakneſs.

The croſs-cauſe is brought by *Vade*, *Mr. Francis Lee*, and others, who are defendants in the original cauſe, and claim beneficial eſtates under the ſettlement which is prayed to be relieved againſt; and it is in order to eſtabliſh the ſettlement of 1737, and to have an execution of the truſts therein contained. Upon theſe two bills the cauſe comes before the Court; and the principal queſtion ariſes upon the original bill, which conſiſts of two parts, which muſt be mentioned in order to lay one part out of the caſe. As far as the original bill ſeeks to ſet aſide the whole deviſe in this court, upon the head of inſanity, by decree, it is ſo far improper; for if it had reſted upon the will as to the inſanity of the deviſor, it was triable at law. For ever ſince the caſe of *Branſby v. Kerr*, in 1727 (*a*), it muſt be taken as a fixed and eſtabliſhed rule, that no will of land or realty, any more than of perſonal eſtate, can be ſet aſide in this court for fraud or impoſition (*b*): for a will ſtands upon a different footing to a deed; for though a teſtator be *compos mentis*, and a will is obtained from him by fraud or impoſition, that affects the will at law; and as a will of a perſonal eſtate may be ſet aſide in the ſpiritual court for fraud or impoſition, as in the caſe of *Powys v. Andrews* (*c*); ſo it may, for the ſame reaſons, be ſet aſide at law (*d*), whether the deviſe is of lands or perſonalty: and the reaſon the law goes upon is, that fraud or impoſition takes away the *animus teſtandi*; and ſuch a will is not taken to be the deviſor's will, but the will of another, and for that reaſon the will ſhall not prevail at law: therefore, as far as that was ſought by the bill, it was very improper. But as the original bill did not only ſeek relief in ſetting the will aſide, but alſo by an amendment upon diſcovery of the ſettlement, prayed relief againſt that, the caſe is reduced to the queſtion upon the ſettlement; and luckily for the plaintiff and the Court the cauſe is delivered from having any conſideration upon the will, becauſe by the recoveries in 1737 that will is revoked (*e*): the great caution of the defendants has defeated themſelves; and it is providential when it ſo happens. Now upon ſuffering the recovery the will is revoked; and though the deeds, to make tenants to the *præcipe*, are not produced (though there is no doubt but there are ſuch), yet that will not alter the caſe, for it does not appear but that *Sir John Lee* was tenant in fee-ſimple of his lands; and he coming in as vouchee, though there were no

Eq. Abr. 133. 406.

(*a*) 1. Eq. Abr. 133. 406. 3. Bro. P. C. 358.

(*b*) James *v.* Greaves, 2. Peer. Wms. 270. Webb *v.* Claverden, 2. Atk. 424. Anonymous, 3. Atk. 17.—*Sed vide* Welly *v.* Thornagh, Prec. in Ch. 123. Herbert *v.* Lowpds, 2. Chan. Rep. 22. Goſs *v.* Tracy, 1. Peer. Wms. 287, 288. Farringdon *v.* Knightly, 1. Peer. Wms. 548.

(*c*) 2. Eq. Abr. 377. 421. Annally, 215. 2. Bro. P. C. 476.—See alſo Archer *v.* Moſs, 2. Vern. 8. Thwaite *v.* Smith, 1. Peer. Wms. 12. Plume *v.* Beale, 1. Peer. Wms. 388. Tucker *v.* Phipps, 3. Atk. 360. Marriot *v.* Marriot, 1. Stra. 666.

(*d*) Goſs *v.* Tracy, 1. Peer. Wms. 287. Webb *v.* Claverden, 2. Atk. 424.

(*e*) See Brudnel *v.* Boughton, 2. Atk. 273. Hick *v.* Mors, Ambl. 215.

tenants

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tenants to the *præcipe*, yet he and his heirs who claim under him are bound by eſtoppel; and ſo determined in the caſe of *Page v. Harward* (*a*), by *Lord Chief Juſtice* HOLT. And the reaſon why there is no want of a tenant to a *præcipe* in a recovery ſuffered by tenant in fee, is this: that if ſuch *præcipe* is brought againſt a ſtranger, who is not tenant, and he vouch the tenant of the lands, and he enters into warranty, by that he admits the ſtranger to be tenant to the land, and ſo binds himſelf and his heirs by eſtoppel. But if he had been tenant in tail, this would not have eſtopped his iſſue, becauſe he claims by a ſuperior gift, *per formam doni*, and not through or by his anceſtor; and the tenant in fee ſhould have counterpleaded the vouchee by ſaying he had nothing in the tenements; and if he do not plead *non tenure* in the voucher, it is an admiſſion that the tenants to the *præcipe* are tenants to the land; and therefore theſe recoveries have revoked the will, and *Sir John Leigh* has by them regained *a new eſtate* (*b*) to the purpoſe of revoking the will, although it be the old one.

The ground upon which the plaintiffs pray to ſet aſide the ſettlement in *September* 1737 is, that it was obtained from *Sir John Leigh*, who was a weak perſon, very liable to be impoſed upon; that he was actually impoſed upon in the obtaining of it by the power and influence which *Vade* had gained over him (*c*); and beſides that power, there are circumſtances of fraud and impoſition appearing upon the face of the ſettlement itſelf. Againſt this relief one general objection has been made on the part of the defendants, that the plaintiffs bill is framed to another purpoſe beſides fraud and impoſition, *viz.* inſanity; and if it contain both, it is inconſiſtent with itſelf, for a man of inſane mind cannot be impoſed upon; for impoſition preſumes, that the party impoſed upon has a power of judging of things, unleſs he is deceived. But as to that, I ordered the original and amended bill to be brought before me, and I have read them, and the objection will not hold; for by the amended bill the whole matter is put in iſſue before the Court, with notice to the defendants to make their defence. The original bill, indeed, was firſt founded upon *Sir John Leigh's* being inſane and *non compos mentis*; but if that had been the caſe, the remedy would have been proper in this court not to ſet aſide the will by decree for inſanity, for that muſt have been done at law, but to have had the conſequential remedy, *viz.* the delivery up of the deeds, which can only be done in this court.

But as to fraud, the plaintiffs are proper to come into this court to have the deed of ſettlement cancelled for fraud, and delivered up, and reconveyance; and therefore in the amended bill the charge is not only of fraud and impoſition, but alſo of extreme weakneſs

(*a*) Salk. 570. 572.

(*b*) Tregonnel *v.* Strachan, 2. Stra. 1179. Hill *v.* Broughton, 3. Brown's C. C. 180. Roe *v.* Baldwere, 5. Term Rep. 104.

(*c*) See White *v.* Small, 2. Chan. Caſes, 103. Clarkſon *v.* Hanway, 2. Peer. Wms. 203. James *v.* Greave, 2. Peer. Wms. 270. Bridgman *v.* Green, 2. Vezey, 627. Evans *v.* Blood, 4. Brown's P. C. 557. Filmer *v.* Gott, 7. Brown. P C. 70.

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in *Sir John Leigh*, and that *Mr. Vade* had made uſe of his power over his weakneſs. The amended bill concludes, that either this deed may be ſet aſide for fraud and impoſition, and that the defendants may reconvey to the plaintiffs; or if the Court ſhall be of opinion that the remedy is at law, becauſe of the inſanity of *Sir John Leigh*, that then the trial may be directed; and there is no inconſiſtency in this, for a man may bring a bill depending upon different equities or grounds that may claſh one with another, in order that if one fails the party may be relieved by the other; and there is no inconſiſtency here, for the relief prayed is in the diſjunctive *(a)*.

The firſt equity which the plaintiffs charge for their relief is, that *Sir John Leigh* was a perſon of great weakneſs of mind, and of inſufficient capacity to manage his affairs as a prudent man; and that this made him liable to be impoſed upon by any perſon who got the government over him.

The ſecond equity is, that the defendant *Vade*, from the opportunity this weakneſs gave him, inſinuated himſelf into *Sir John Leigh*'s good opinion, gained a power and influence over him, and exerciſed it in many inſtances, as the commanding his perſon and affairs; and that by the ſame power he obtained the preſent deed from him.

The third equity is, that upon the very face of the deed itſelf there appears to be fraud in the obtaining of it.

As to the firſt head of equity, viz. *Sir John Leigh*'s weakneſs and inability to manage his own affairs, that is very plain to me, notwithſtanding all the evidence read on the part of the defendant, that *Sir John Leigh* was a very weak man, but one remove above idiotcy, or being a lunatic; for that he was not either I ſhall take for granted, and am juſtified by a jury of gentlemen upon an inquiſition iſſued out of this court finding him not to be ſo; and this weakneſs is an evidence very ſtrong for the plaintiff. It has been ſaid on the part of the defendant, that all the evidence of the plaintiff in the original cauſe, if it is ſo to be believed, and proves any weakneſs at all, it proves it to a degree of inſanity; and indeed, from what ſeveral of the witneſſes ſay, it does amount to inſanity; but as all thoſe teſtimonies are matter of opinion, and as the boundaries between an *actual inſanity* and *great mental weakneſs* are but very narrow, it is no ſurpriſing thing that ſome of the witneſſes ſhould be miſtaken in judgment, and take that for real inſanity which is no more than great natural weakneſs.

It is uncontradicted, that from the time of *Sir John Leigh*'s marriage with *Sir Stephen Leonard*'s daughter he and his affairs were under the entire governance of *Sir Stephen*, and that after his deceaſe he fell into the management of *Sir Samuel Leonard* his ſon, and continued ſo for many years, and till *Sir John Leigh* had a

(*a*) See Stapleton *v.* Stapleton, 1. Atk. 6. Attorney General *v.* Jeanes, 1. Atk. 355. Cook *v.* Martin, 2. Atk. 3. Grimes *v.* French, 2. Atk. 141. Dormer *v.* Forteſcue, 3. Atk. 132. Weymouth *v.* Bowyer, 1. Vezey, jun. 426.

ſon

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ſon upwards of twenty-one years of age, under whoſe care he was then left; and the ſon was a guardian both to his father's perſon and fortune for nine years, when the ſon unfortunately died. After his death, *Sir John*'s well-wiſhers were ſo ſenſible of his weakneſs, that ſeveral neighbouring gentlemen were ſolicited to take upon themſelves a kind of voluntary truſt and cuſtody of his affairs. *Mr. Onſlow*, the ſpeaker of the houſe of commons, was applied to amongſt the reſt; and though he declined anything perſonal himſelf, yet he recommended it to other gentlemen, and was at ſeveral meetings for that purpoſe at *Sir John Leigh*'s; and upon advice one amongſt another, *Sir John Leigh* ſeemed to take no notice, but ſaid nothing, and behaved like a perſon who was to fall under the cuſtody of ſome one or other. *The Speaker* adviſed him, as he would warn a child from fire or water, not to ſet his hand to any writing whatſoever. The gentlemen of the country undertook this truſt, which they would not have done if *Sir John Leigh* had been capable to have acted without them; and if he had been a man of any ſenſe, he would not have ſubmitted to their governance over him. Beſide *Sir John Leigh*'s natural infirmities, he added by his exceſſive drinking, for he would often get drunk, and *Mr. Vade* would drink with him till twelve o'clock at night very frequently; ſo that towards the latter end of his life he was full of bodily diſorders, very lame, quite blind of one eye, and almoſt dark of the other, which was the caſe when he executed the will and ſettlement: and all theſe things rendered him more liable to be impoſed upon. Beſides this general evidence of his weakneſs, and he being eaſily impoſed upon, there is a ſpecial inſtance given, which was this: When it was judged neceſſary, upon a mortification, to take off his toes and part of his foot, *Mr. Vade* perſuaded him that his toes would grow again; and though the defendants ſay, that this was a pious fraud under this calamity to ſooth *Sir John*, yet to be ſure it is a great ſign, at the ſame time, of his weakneſs and incapacity. It is proved by *Mr. Dicken* the ſurgeon and *Mr. Cheſelden*, who attended him in this mortification, that in conſulting upon his caſe they never regarded the decorum of their profeſſion, but determined upon their operations openly before him, without ever adviſing with him: for they uſed him like a child, as they took him to be as weak.

There is another proof of weakneſs of *Sir John* in his marriage, which was thus: There is *Mr. Vade*, a ſurgeon and apothecary, brought to attend a gentleman of *Sir John Leigh*'s quality and eſtate under his mortification, and finds him under ſuch a ſtate of weakneſs, that he contrives with *Mr. Douglas*, a ſurgeon in *London*, to marry him to *Mr. Vade*'s daughter, a girl of about ſixteen years of age, to an infirm man of about fifty-five; that they talked before *Sir John* about his marriage as though he was not in the room; and one of the company propoſed *Mr. Vade*'s daughter as a proper match: but *Mr. Vade* anſwered, he would not marry his daughter to ſuch a fool and madman. However, he gets the better of this nicety; and on the fifteenth of *May* 1733, when *Sir John Leigh*

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is in town, he is made to believe that he is going to a chriſtening. When he is there, they hurry him away to *Mr. Gheton's*, a colour-man's in *Long-Acre*: they tell him, upon his aſking, that he is going to a friend's. When he comes to *Mr. Gheton*, there was ſuch immoderate drinking of punch that he is quite fuddled. *Mr. Douglas* and *Vade* ſtep for a *Fleet* parſon, and *Gill*, a ſervant who uſed to attend conſtantly on *Sir John's* perſon, is ſent away, with other ſervants, to an alehouſe. The parſon and the young lady are then introduced; and during the marriage-ceremony *Sir John* is put with his back to a chair, and ſupported under the two ſhoulders by *Mr. Vade*; and he was ſo drunk and inſenſible that he could make no reſponſes; and *Mr. Vade* once letting looſe of his hold, *Sir John* fell down on his back, unable to ſtand. After this *Mr. Vade* and his daughter take up their habitation at *Adington*, and manage all affairs, and *Sir John* ſhews no paſſion or concern at it; but if he had been a man of ſenſe or ſpirit, and not to the laſt degree weak, he would have reſented ſuch an infamous impoſition upon him. There is evidence on the part of the defendants to controvert this, and to ſhew, that *Sir John Leigh* was capable of managing his affairs, though moſt of the deponents for the defendants ſwear, that he was not able to judge of or underſtand the will or ſettlement, or to manage his property; but ſeveral of the witneſſes ſwear, that he was a man of learning, a good ſcholar, and capable of managing his concerns; nay, one goes ſo far, that he is as capable of doing it as any man in *Surrey*. But ſtrong as this evidence is in words, it weighs very little with me, becauſe it is contrary to plain facts admitted on both ſides; and when that is the caſe, the facts muſt and will ſpeak for themſelves. But can anybody credit the evidence of ſome of theſe witneſſes, when it is plain *Sir John* believed his toes would grow again; that *Sir John* tamely ſubmitted to the indignity of ſuch a marriage, &c.? The evidence of *Sir John Leigh's* being an excellent ſcholar, that he underſtood claſſical authors and figures, I do not doubt but that he was capable of learning ſomething of this nature; for it often happens, that people *non compos*, or if not ſo yet very weak, may retain ſome things or pieces of learning which have been taught them in their youth, and yet the ſame people be incapable of remembering facts or new incidents; and you may go into *Bedlam* and meet with people who will talk *Latin* and impoſe upon ſome ſuch witneſſes as theſe.

As to the evidence of the defendants in regard to *Sir John Leigh's* capacity in managing his affairs, there are ſome things ſhewn to that purpoſe. After the commiſſion of lunacy iſſued in *April* 1733, *Mr. Vade* took care to inſtruct *Sir John* in ſome things in order to ſhew his capacity to manage his affairs. To this purpoſe he made him write ſome receipts, and copy others, and to talk with his tenants about money; but it is proved that he could not diſtinguiſh a guinea from a moidore or a piſtole; and after the marriage it is plain, *Mr. Vade* took upon him the whole care of his affairs.

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As to the ſecond head of equity, for the plaintiffs it is proved in the cauſe, that *Mr. Vade* having got *Sir John Leigh* in his power after the marriage, gave riſe to a commiſſion of lunacy being taken out by the heirs at law, who now thought it high time to do it; and they were not to be blamed. However, upon the execution of that commiſſion, it appears a great noiſe was raiſed in the country about it by the induſtry of *Mr. Vade* and his friends; as, that the heirs at law were come to take him into cuſtody, and to deprive him of his eſtate; and it often happens, that the thing which the law provides for the protection of a man and his eſtate is taken to be a proceeding againſt him. The commiſſion did not ſucceed, for he was found not to be a lunatic; upon which it was natural for *Sir John Leigh* to be provoked at theſe relations for taking out ſuch a commiſſion againſt him. *Vade* took care to incenſe *Sir John* upon this head, and to ſay the worſt of things againſt *Mr. Bennett* and *Mr. Spencer*; and when *Mr. Bennett* came to ſee *Sir John*, he was denied admittance; and a letter was ſent in 1737, ſigned by *Sir John Leigh*'s name, to *Mr. Bennett*, but by whom wrote does not appear, wherein *Mr. Bennett* is deſired never to come near *Sir John* more, for he would not ſee him. But this letter, no doubt, was a contrivance; for there is a copy of it ſigned by *Sir John*, and atteſted by two perſons, which in ordinary caſes is not done; but this was done for the juſtification of ſomebody, when there ſhould be occaſion. If theſe relations had been admitted to ſee *Sir John*, they might have acquainted him with their reaſons for ſuch a procedure, have begged his pardon, and have been reconciled to him; but they are prevented from making any viſits, and with a ſtrong hand too. A watchman is ſet upon *Windmill Hill* to ſee when any coach was coming; and that was not out of any apprehenſion of *Sir John*'s being carried forcibly away, for the many ſervants in the family would have prevented that; and it was deſigned merely to exclude any intercourſe between the heirs at law and *Sir John Leigh*. *Mr. Vade* gave orders too, that if any letters came directed to *Sir John Leigh*, that the ſervants were not to deliver them to their maſter or lady, but were to keep them till he came home; and it was ſworn, that a letter came directed to *Sir John Leigh*, which was opened firſt by *Mr. Vade*; and the intent was, that if any letters came which were prejudicial to *Mr. Vade*'s intereſt with *Sir John*, they were to be ſuppreſſed, but if they were letters of courſe they were carried to *Sir John*.

As to *Vade*'s power over *Sir John Leigh*'s affairs, he tranſacted them as he thought fit, and made him ſign any papers he thought fit to bring to him; and at night, when they were drinking, all perſons were excluded from *Sir John Leigh*'s company except thoſe whom *Mr. Vade* admitted; and he would not ſuffer anybody to ſpeak to him but in his preſence; and when *Mr. Paris* came to *Sir John Leigh*, from the ſpeaker *Mr. Onſlow*, to enquire about his marriage, *Mr. Vade* did not once go out of the room. Nay, *Mr. Vade* had gained ſuch a power over him, that his name was a

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terror to him, and the nurſe was uſed to quiet him like a child, by repeating only the name of *Vade*.

As to the third point of equity for the plaintiff, that upon the face of the deed itſelf there appears to be fraud in the obtaining of it. It is a ſettlement by leaſe and releaſe, bearing date the ninth and tenth of *September* 1737, and *Sir John Leigh* died in the *November* following; ſo that it appears to be obtained in the latter part of *Sir John*'s life, when his infirmities had made his capacity leſs, and *Mr. Vade*'s power greater.

By this ſettlement, the whole eſtate is ſettled and conveyed to *Mr. Wynne*, *Mr. Tonks*, and *Mr. Welchman*, and their heirs, to ſeveral uſes, *viz.* to the uſe of *Sir John Leigh* for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon of *Sir John* in tail, remainder to his daughters in tail. But theſe remainders to his iſſue are only colourable, for *Sir John* was grown very infirm and aged, and his wife dead, ſo that there was ſcarcely any poſſibility of iſſue. Then an annuity is given to *Wildman* and his wife, and the ſurvivor of them, for their lives, of forty pounds a-year, chargeable upon and iſſuing out of the whole eſtate. Then as to the eſtates in *Surrey*, after the above remainders they are limited to the uſe of the defendant *Francis Leigh* for life, remainder to his firſt and every other ſon in tail male, remainder to the uſe of *Thomas Leigh*, younger brother of *Francis*, in like manner, remainder to *Francis Jones* for life, remainder to truſtees for five hundred years, remainder to his firſt and every other ſon in tail, remainder to his daughter in tail, remainder to *Thomas Leigh* and his heirs.

Then as to the eſtates in *Kent* and *Middleſex*, they are limited to the uſe of *Vade* the defendant and his heirs for ever. Then follow ſome proviſoes. The firſt, that it ſhall be lawful for *Sir John Leigh* to demiſe the land for a certain number of years, or three lives, receiving the moſt improved yearly rents which can be got without fine, and ſo as ſuch leaſes are not made diſpuniſhable of waſte. Then follows another proviſo, containing a power of revocation, wherein *Sir John Leigh* has the liberty to revoke or make void all or any of the uſes, clauſes, limitations, &c. included in the ſame ſettlement, by any writing duly ſealed and delivered, ſo as it be made in the preſence of and atteſted by *James Leigh*, of *Beckenham*, in the county of *Surrey*, *John Eton Dodſworth*, of *Goodman's Fields*, and *James Douglas*, of *London*, merchants.

By this ſettlement, *Sir John Leigh* has abſolutely diſinherited his heirs at law, who were alſo his next of kin, and has given his *Surrey* eſtate to *Mr. Francis Leigh*, who, as the matter is before me, does not appear to be any relation to *Sir John Leigh*; for there is no proof at all how near in kindred he was to him, nor does it appear that he was ſo much as ever acquainted with him, or that *Sir John Leigh* ever teſtified any friendſhip for him. A remainder of the ſame eſtate is limited to *Mr. Thomas Leigh*, who is a material

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material witneſs for the plaintiffs in proving *Sir John Leigh*'s weakneſs and *Mr. Vade*'s power over him. As to the heirs at law, it is proved by *Mr. Scott*, that when *Sir John Leigh* talked reaſonably, he was uſed to ſay he would beſtow his eſtate to his right heirs. As to the *Kent* and *Middleſex* eſtates, they are given to the defendant *Vade*, who was no acquaintance at all of *Sir John*'s till he attended him in his mortification, and who had no other merit but that of marrying him, and managing his affairs in the moſt infamous manner.

Sir John Leigh had a power over his eſtate in fee-ſimple; and notwithſtanding a will is the moſt proper way of making voluntary diſpoſitions, becauſe of the little difficulty in revoking them, and notwithſtanding there was a mortgage of three thouſand pounds upon the eſtate, yet is he perſuaded to make a voluntary ſettlement, and to fetter himſelf in ſuch a manner that he could not, in effect, make any other diſpoſition of it, or raiſe one ſhilling off it for his own benefit; for as to the power of leaſing, it is made as ſtrict as thoſe in marriage-ſettlements, for he is not to make leaſes in reverſion, nor upon fines or ſmall reſervations; ſo that he could not raiſe any money.

Then as to the power of revocation, it is of the moſt extraordinary nature I ever met with, and ſpeaks impoſition. And it is certain, the framer of this ſettlement was ſenſible, that if he had not inſerted ſome power of revocation, it would have been an objection to the deed in this court; and it has been almoſt foundation enough itſelf to ſet aſide a voluntary ſettlement, that there has been no power of revocation in it: for this purpoſe there is a power of a revocation, but ſuch an one that it ſhould be in the power of *Mr. Vade* or his friends whether *Sir John Leigh* ſhould ever have it in his power to execute it or not, for it is to be executed in the preſence of three perſons, their executors, adminiſtrators, and aſſigns. Is there any proof whether he was acquainted with theſe three gentlemen? No. Is there any proof that he directed ſuch a power? No. It is ſaid, if there had been any charge of this nature in the bill, the defendants might have examined as to that; but they had notice enough of this objection, for the ſettlement itſelf was impeached, which was notice enough to make defence in ſupport of the power of revocation; and the objections would naturally ariſe upon this proviſo or power of revocation. Suppoſe *Sir John Leigh* had been ſeized with a ſudden illneſs, and was deſirous to make an alteration in this ſettlement, he could not convene theſe three gentlemen together, perhaps, for they would not poſſibly come; and if they had died, *Sir John* is under the neceſſity to find out their executors, adminiſtrators, or aſſigns. It is ſaid, this part, "the executors, adminiſtrators, or aſſigns," is nonſenſe, becauſe this is a perſonal truſt, not aſſignable or tranſmiſſable to repreſentatives. AND I AM OF OPINION, it is part nonſenſe and part not; and I have known very fooliſh weak things done with a very villainous intention; and theſe words, "executors, adminiſtrators,

" ſtrators, and aſſigns," fetter this proviſo more, for there may be no ſuch repreſentatives; and if there are ſuch, it may be more difficult to find them than the gentlemen they repreſent. But it is ſaid, in caſe there had been no repreſentatives, or the gentlemen had refuſed to have come, and *Sir John Leigh* had done all he could to convene them, the revocation without their being preſent would be ſufficient. AND I AM OF OPINION, that ſuch revocation would be good, if executed for a valuable conſideration; but if a voluntary revocation, it would not be good; for theſe gentlemen are to be checks upon *Sir John*, to prevent his being ſurprized into anything, and they ought to have been preſent; and he might have as well wanted to have made a voluntary revocation as not. But it is ſaid, if *Sir John* wanted to raiſe or borrow money, or to ſell his eſtate, or to make any new ſettlement for a valuable conſideration, that that will be good, and prevail againſt any voluntary ſettlement, by the ſtatute of 27. *Eliz.* c. 4. But *Sir John* had not knowledge enough to know that the law is ſo; and I believe the party who drew the conveyance knew not ſo much; but by this revocation they ſettered *Sir John* as much as they could; and if *Sir John* wanted to raiſe money, or to ſell, would any prudent man have ventured his money where there was ſo reſtrained a power of revocation, if the gentlemen had refuſed to have been preſent at the execution? They had got a will from *Sir John* before, but that was too ſlippery a thing for them; it was always revocable, and *Sir John* might be got out of their power and revoke it; and therefore they pinned him down by this ſettlement.

This reſtrictive power of revocation has been compared at the Bar to the caſe of the *Duke of Mountague v. Bath* (*a*). That was a ſettlement made by *Charles Duke of Albemarle*, who was going as Governor of *Jamaica*. In this ſettlement was included a power of revocation in *his Grace*, ſo as it was executed in the preſence of ſix witneſſes, three whereof to be peers of *England*; and it was ſaid, that *his Grace* was more reſtrained by ſuch a power as this than *Sir John Leigh* by the preſent; and yet that was a very good one. But that was a different caſe; and as to what was ſaid at the Bar, that *his Grace* was then juſt going to *Jamaica*, where it would be impoſſible for him to revoke this deed according to the expreſſion, for he would not be able to get three peers of *England* in that iſland, I have looked into the caſe, and the fact is not taken notice of there. If ſo, it is out of the caſe; for if he was to be reſident in *London*, it would be no difficult matter to execute this revocation according to the formality of it; for it would be a very eaſy matter to perſuade three peers of *England* to be at the execution of ſuch a power of revocation, and to atteſt it; but it was proved in that caſe, that the deed was made between relations of the family, and that it was drawn up by *Sir Thomas Stringer*, the family Counſel, by the direction of *the Duke* himſelf, and peruſed by *Sir William Jones*, whoſe hand-writing appeared before this

(*a*) 3. Chan. Caſes, 55. 2. Chan. Rep. 417.

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very proviſo or power of revocation; and *Sir William Jones* alſo was a witneſs to the deed; and that is not like the preſent caſe, for the preſent ſettlement is not made to relations or people of the family, no Counſel adviſed upon it, and no inſtructions given for it by *Sir John Leigh*.

As to the manner of the execution of this ſettlement, it does not appear to have been read over to *Sir John Leigh* at the time of the execution; and indeed the ingroſſment very often is not read over, if the draft has been read over before. But *Mr. Wildeman* who prepared the draft ſwears he did read it over before *Sir John*; but I lay very little weight upon that, becauſe things were often ſaid in his preſence without his taking any manner of notice of them; nor was this deed left with *Sir John*, but taken away by *Mr. Vade*. How, therefore, could *Sir John* tell how to execute this ſpecial power of revocation? And therefore this is a circumſtance which makes this deed equivalent to an abſolute conveyance.

In order to ſupport this deed, the defendant has gone into a general intention in *Sir John Leigh* to diſinherit his heirs at law, and to give his eſtate to the perſons to whom it is limited in voluntary ſettlement; and from the will executed the ſeventh of *Auguſt* 1733, and the codicil in *April* 1735, and afterwards the will which gives theſe eſtates to the perſons in the preſent ſettlement, the Counſel for the defendants infer, that theſe antecedent acts prove that the preſent ſettlement did not proceed from ſurpriſe, but from intention. But what is remarkable is, that all thoſe wills are executed after *Vade* had got this power and influence over him, and juſt after the inquiſition of lunacy was executed againſt *Sir John Leigh*, and when he was under reſentment for that uſage. The firſt will of *Sir John Leigh* is a deviſe of his eſtate to truſtees to raiſe money to pay his debts; and then a rent-charge of eight hundred pounds *per annum* is given to his wife, *Mr. Vade*'s daughter. He alſo gives her his houſe at *Addington*, and one hundred pounds *per annum* to maintain it in repair; and then gives her all his perſonal eſtate. Then all his real eſtate is given to himſelf for life, remainder to the heirs of his body, ſubject however to annuities to *Twynie* and *Stalker*, who were aſſiſtants in the marriage, of thirty pounds a-piece; and theſe are like the annuities in the ſettlement to *Wildeman*.—*Mr. Stanley* ſays, *Sir John Leigh* gave him inſtructions to make this will; but whether they were in writing or not does not appear; or whether *Mr. Vade* had any hand in them. This will ſeems very modeſt; for *Mr. Vade* upon the face of it has not given himſelf anything; but there was a codicil, which the defendants were very unwilling to read, by which when produced it appears, that *Sir John Leigh* gives his manor of *Weſtwickham*, for five hundred years, to *Mr. Vade*; and then there are uſes to *Sir John*'s iſſue after this term. *Mr. Stanley* does not appear to have had any hand in this, but it ſeems to be the hand-writing of *Wildeman*; and this term is irredeemable, and

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as good as the fee-ſimple. After this follows the will of 1736; and by that he diſpoſes of the eſtate, after the death of the wife, in the ſame manner almoſt, as to the beneficial uſes, as he has done in the voluntary ſettlement, except as to *Sir Richard Leigh*, who has no remainder in the ſettlement. *Mr. Vade* is made executor of this laſt will, and has the perſonal eſtate. Both theſe wills, being revoked, are out of the queſtion, except as to the evidence of *Sir John Leigh*'s general intention of the diſpoſition of his eſtate. But I am of opinion, there is no evidence at all of that, for they are both made after *Mr. Vade* had got the power over him, and could make him ſign what writing he would. The caſe of *Standard v. Metcalfe* (*a*) was, where a ſettlement had been obtained from *Mrs. Barbara Standard*, who afterwards proved to be a lunatic, and under a weakneſs perhaps at that time; this Court inclined to ſet it aſide, but its judgment was altered by a will executed by *Mrs. Barbara Standard*, and a codicil thereto, when ſhe was in her ſenſes, and not under the influence of the perſons who were benefited by the ſettlement; and this will and codicil were to the ſame uſes as the ſettlement; which ſhewed the general intention of beſtowing it according to the diſpoſition in the ſettlement; and it appeared the draft was made of the ſettlement by the directions of *Mrs. Barbara Standard*, and left with her for her peruſal, and her intention ſupported by witneſſes who were not parties to or benefited by the ſettlement. But none of theſe advantageous circumſtances are in the preſent caſe; and the evidence to ſhew the fraud in this ſettlement is very ſtrong.

S. C. cited poſt.

Three objections are made for the defendants.

THE FIRST, That *Sir John Leigh* was a lunatic; and then the evidence of impoſition is out of the caſe, and it is to be tried at law.

THE SECOND, admitting it ſhould be taken by the Court that he was not a lunatic, yet there has been no impoſition; and that there is no ſufficient evidence of any ſuch thing.

THE THIRD, ſuppoſing there was evidence of fraud and impoſition, yet it is ſuch as the heirs at law cannot take advantage of, becauſe there is the plea of the intention of *Sir John Leigh* to diſinherit the heirs; and if it is to ſet aſide the ſettlement, it ſhould not be in their favour.

As to the firſt, the Court is at liberty to take the evidence as a proof of weakneſs of mind; for as a jury of gentlemen, upon their oaths, found him not to be a lunatic, it is reaſonable for the Court to ſay he is not ſo; and the boundaries between weakneſs and lunacy are ſo very narrow, that the Court muſt judge of them upon the facts and circumſtances; upon which it appears to me that he was not *non compos*.

As to the ſecond objection, the Counſel for the defendant ſay, if *Sir John Leigh* is not a lunatic, but only weak in mind, that that

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very weakneſs ſuppoſes him, under certain circumſtances, capable to do an act, which act ſhall ſtand, unleſs there is evidence of impoſition. And it muſt be taken he was capable to do an act; and then the queſtion will be, Whether there was not impoſition? Which I have before decreed there was, and will not repeat, but will in this place only take notice of the evidence of *Dr. Barnard* for the defendant; which, from his known character and integrity, weighs much with me; and it is in relation to the execution of the will in 1736. The Doctor was preſent at the reading over and execution of it; and ſwears, that *Sir John Leigh* appeared to him to be of ſound mind, memory, and underſtanding, at the time of ſuch execution; and what he meant by ſound mind, &c. is proved from a former part of his depoſition, upon his talking with *Sir John* about claſſical learning; and *Dr. Barnard* ſwears, that *Sir John* underſtood the will, and what he did, and that he was capable of managing his affairs by the aſſiſtance of thoſe he choſe, for he himſelf was lame, and almoſt blind; which is an admiſſion he could not do it without ſuch aſſiſtance; and it is plain what that aſſiſtance was, viz. *Mr. Vade*, who had the abſolute management and conduct of his affairs.

As to the third objection, whereby it is inſiſted, that *Sir John Leigh* had a plain intention to diſinherit his heirs at law, and was not impoſed on in that, and therefore no ground of equity to relieve the heirs in giving back the eſtate to them, contrary to the intention; as to that, it is to be conſidered under what circumſtances he became poſſeſſed of the intention of diſinheriting his heirs at law, and whether that did not proceed from the ſame impoſition as the deed did. It is proved by *Mr. Scott*, that *Sir John* often ſaid that he would not give his eſtate from his heirs; and, When is it that he alters this intention? Why, when *Vade* comes to have the management of him, and when the commiſſion of lunacy was taken out by the heirs at law, which *Mr. Vade* took an opportunity to make an occaſion of diſguſt againſt the heirs: and the interception of the letters of the heirs at law to *Sir John* was proved; and this impoſition was as plain as any impoſition in any other part of the caſe. The perſon too who takes the moſt beneficial intereſt in the will and ſettlement ſays, that the tranſaction was moſt iniquitous, and the heirs at law might ſet the deed aſide; and this is proved by two witneſſes of *Mr. Francis Leigh*. Then as to the objection, that if this ſettlement is ſet aſide, the heirs at law ought not to have the eſtate, becauſe of the plain intention to diſinherit them, there have been inſtances where people have been prevailed upon to execute a ſettlement againſt their intention, and they intended to give the eſtate to another perſon; yet when ſuch ſettlement is ſet aſide, the Court cannot give the eſtate to the party deſigned to have it, but it goes to the heir at law, which is the conſequence of law and equity; and it goes in the proper courſe of deſcent; and there is the leſs reaſon to ſupport this ſettlement, when the perſon who takes the moſt beneficial intereſt admits the will and ſettlement to be fraudulent. And this caſe is very like that of *Topp v. Stanhope*,

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Stanhope (a), where a mother got her ſon, *Sir John Topp*, into her power, and by the aſſiſtance of *Dr. Stanhope*, her ſon by another marriage, had prevailed with him to leave his manſion-houſe and reſide with them. *Sir John Topp* was a very weak perſon, almoſt a lunatic, and as proper an object of a commiſſion as *Sir John Leigh*. When *Sir John Topp* was there, they obtained ſettlements from him; and it appears from the printed caſe, that the circumſtances were the ſame there as in the preſent caſe; the only difference is this, they did not give him a wife to fetter him by that means, but he got one himſelf, who delivered him. It was proved, that he had fits; that they kept all perſons from having acceſs to him; intercepted letters, and did not ſuffer them to be delivered to him; they could make him ſign what deeds and writings they pleaſed, and made him copy over letters they had dictated to him. As to the ſettlement itſelf, there was no evidence of impoſition as to *Mrs. Topp* and *Dr. Stanhope* but what aroſe from their general conduct towards *Sir John Topp*; but for that, and the general frame of the deeds, they were ſet aſide in this court; and there was an appeal by the mother and *Dr. Stanhope* againſt this decree, which was affirmed in the Houſe of Lords on the twentieth of *May* 1720, with one hundred pounds coſts. The evidence of the weakneſs of *Sir John Topp*, and the power and government of the mother and brother-in-law, was not one-tenth ſo ſtrong as in the preſent caſe.

Therefore the preſent ſettlement is to be ſet aſide, and the eſtate conveyed to the heirs at law (*b*).

(*a*) 2. Brown's P. C. 183. (*b*) See Bates *v.* Greaves, 2. Vezey, jun. 287.

Richards *againſt* Baker (*a*).

Caſe 118.

In Chancery, Trinity Term, 15. & 16. *Geo.* 2. 1742.

If a huſband devi ſe to his wife " all his houſe- " hold plate, " linen, and " china, be- " longing to his " houſe at *A.* " AND ALSO " his houſe and " gardens " thereto be- " longing, ſo " long as ſhe " continues his

JOHN RICHARDS, the plaintiff's father, made his will, in which, among other things, was this clauſe: " I deviſe to my " loving wife, *Dorothy Richards*, the ſum of two hundred pounds, " to be paid in three months after my death, and all my houſhold " goods, plate, linen, and china, belonging to my houſe at " *Teddington*, and alſo my houſe and gardens thereto belonging, " ſo long as ſhe continues my widow, and no longer" (which laſt clauſe was interlined), " together with my jewels, coach, chariot, " and coach-horſes;" and deviſed all the reſt and reſidue to the " child of which his wife was *enceinte*, if a ſon, and if not to *Iſaac* " *Richards*;" and made the child executor, if a ſon, and the defendants executors *durante minori ætate*.

" widow, together with his jewels, coach, and coach-horſes," ſhe takes the jewels, coach, and coach horſes *abſolutely*, and *the uſe* only of the houſe and furniture during her widowhood.—S. C. 2. Atk. 321. 2. Burr. 880. 8. Viner. Abr. 215.

(*a*) Reg. lib. B. 1741. fo. 340.

RICHARDS *against* BAKER.

The plaintiff, who was the child of which the wife was *enceinte*, filed his bill to eſtabliſh the will; and it was ordered at THE ROLLS, that the wife ſhould deliver a ſchedule of thoſe things which were ſpecifically deviſed her during widowhood *(a)*, without determining to what part of the deviſe the limitation extended.

And, on an appeal, it was argued by MR. BROWN, that thoſe words, "ſo long as ſhe continues my widow," muſt extend both to the clauſe precedent to them, in which the furniture is deviſed, and to the ſubſequent one, which gives her the jewels; and he cited two caſes in 1. *Ro. Abr.* 844. and the caſe of *Lake v. Bennet (b)*, decreed by LORD HARDWICKE, *February* 1, 1737, where *Sir John Lake*, by codicil, diſpoſed of his houſhold furniture in this manner: "I give to my niece one hundred "pounds, and the houſe I live in during her life, together with the "houſhold goods, plate, pictures, and linen:" and it was decreed, ſhe had only a life-intereſt in the houſe and furniture; and the words "together with" are connected with the two clauſes.

HARDWICKE, *Lord Chancellor*. This will is very doubtfully penned. As to the decree at THE ROLLS, it was ſaid, there was no determination of this matter. Whether it was debated or not does not appear; but certainly it was taken for granted that ſomething was given to her only *during her widowhood*. But however, be that as it will, the queſtion comes before me on the foot of the deviſe. And the words are, "I deviſe to my loving wife, *Dorothy Richards*, "two hundred pounds," which is a legacy given her abſolutely. Then comes, "and all my houſhold goods, plate, linen, &c." And the queſtion ariſes upon theſe words of limitation as to their relation and extent; and, whether they are to be confined to the houſe and gardens, or to extend to the linen; or, laſtly, whether they are to be carried on to the "*ſimul cum* my jewels, coach, &c." Now, as to the firſt part, I cannot be of opinion that it is confined to the houſe and gardens, but that it at leaſt extends to the furniture, &c. This is a natural conſtruction; for it is not an abſolute bequeſt, but reſtrained to the *res continens*, *viz.* the houſe in which they were; and it was his view they ſhould go together; and as this is the natural ſenſe, the words purſue it, for it is impoſſible to divide them; they fall under the ſame deviſing verb, and under the ſame deſcription of deviſe. Some caſes have been cited, but there is one more modern on the ſame ſubject, I mean the caſe of *Cole v. Rawlinſon (c)*. It is true, *Lord Chief Juſtice* HOLT differed from the other Judges. The words were there, "I give, ratify, and confirm, all my eſtate, right, "title, and intereſt, which I now have in it, *and alſo* the houſe "called the *Bell Tavern*, to *John Bellingſley*;" and the queſtion was, What eſtate *John Bellingſley* took in the *Bell Tavern* by this deviſe? And *Lord Chief Juſtice* HOLT was of opinion, that the words "all my eſtate" extended only to the firſt clauſe; but the

(*a*) See Bill *v.* Kinaſton, 2. Atk. 82.
(*b*) 1. Atk. 470.
(*c*) 1. Salk. 234. S. C. 2. Ld. Ray. 831. 1702. S. C. Holt, 744.—See alſo 8. Viner's Abr. 215. and the caſes there cited.

other

RICHARDS *againſt* BAKER.

other three Judges held it was but one ſentence (*a*); and put the caſe of tranſlating it into *Latin*; but what they laid the greateſt ſtreſs on was, the whole ſentence being governed by one verb; but the caſe is ſtronger here, becauſe the words of limitation follow both. It has been obſerved, that theſe words are in *an interlineation*; and from hence it is inferred, that this was a mere intention in the teſtator, and that the firſt copy was written without any interlineation, and then he bethought himſelf of adding that clauſe. But I doubt that is too uncertain a conjecture for me to found a decree on, and would make the conſtruction of wills very doubtful; for theſe interlineations may ariſe from different cauſes. It might be left out of the copy; and what makes way for that conjecture is, that the word "belonging" is twice uſed in two lines; and the clerks ſkipping over the lines is often the cauſe of error both in the *Greek* and *Latin* authors. If that be ſo, it makes way for the other part, that they were inſerted to reſtrain both; and I am of opinion it goes to both. As to what has been ſaid of theſe things being periſhable is not material, for notwithſtanding we often ſee people provide that china and furniture of that ſort ſhall deſcend with the houſe.

The next queſtion, If this limitation is to be carried on? will bear a different conſideration; for I may give one thing for life, together with another thing in a different manner, unleſs there is ſome connexion between the things given; and if they were appurtenant, I ſhould be of opinion they were given in the ſame manner; but theſe things are entirely of a different nature, and extraneous to the houſe. As to the jewels, they probably were her *paraphernalia*, and there was no occaſion to make them appendant to the houſe; and if theſe words were inſerted on a new conſideration, his placing them in that part of his will was an indication of his intention: and indeed, whether they were interlined or not, their coming before the jewels makes this the moſt probable conſtruction; for if he intended otherwiſe, it would be more natural to place them afterwards.

AND IT WAS DECREED, that *Dorothy Richards* is entitled to the abſolute property of the jewels, coach, chariot, and coach-horſes, given to her by the will of *John Richards*; but that ſhe was intitled only to the uſe of the teſtator's houſhold goods, furniture, plate, linen, and china, in his houſe at *Teddington*, wherein he dwelt, or to the houſe belonging, during her widowhood.

(*a*) And the judgment given on the opinion of the three Judges was affirmed in the Houſe of Lords, 1. Brown's Caſes in Parl. 108.

Caſe 119.

Richards *againſt* Sims.

In Chancery, Trinity Term, 16. Geo. 2.

The Court will not grant a new trial, upon a ſuggeſtion that the party was not appriſed of a particular evidence (*a*).

S. C. 2. Atk. 319.
S. C. Bar. C. 90.

ON A MOTION for a new trial the caſe was thus:—*Richards* the plaintiff, as adminiſtrator of his father, brought a bill in 1739 for the diſcovery of deeds and papers, and to foreclose a mortgage of fourteen hundred pounds. The defendant inſiſted on a gift made to him of the mortgage-money by the inteſtate a little before his death.

On which two iſſues were directed: FIRST, Whether *Richards* gave the deeds, and what deeds, to *Sims?* SECONDLY, Whether he forgave the debt to *Sims?* Both theſe iſſues were found for the plaintiff at the bar of the court of king's bench, where there was evidence given that the defendant's witneſſes (by which he proved his gifts) were not at that time in *Richards'* family. *Vere*, one of them, was ſworn to have ſailed in *The Triumvirate* to *Liſbon*, where *Ruſſell* ſwore he drank a pint of wine with him; and the other witneſſes were all ſworn to be abſent at that time.

And now IT WAS MOVED *for a new trial* on many affidavits, which proved the witneſſes preſent, and denied the *alibis*; but one of the defendant's witneſſes, who ſwore that *Vere* was not in *The Triumvirate*, was not there himſelf, and ſo could not properly atteſt *Vere*'s being abſent.

On the other ſide an affidavit was read, by which it appeared, that *Walbridge*, one of the witneſſes, told *Sims*, a fortnight before the trial, he was afraid it would be proved that *Vere* was abroad at that time, and mentioned the ſhip he ſailed in, and the place to which he ſailed.

MR. BOOTLE for the plaintiff *Richards* cited the caſe of *Wood v. Gunſton* (*b*), and the caſe of *Gay v. Croſs* (*c*), to ſhew how unwilling the Courts were to grant new trials after trials at bar.

HARDWICKE, *Lord Chancellor*. This is an application for a new trial, and comes after great length of time and very extraordinary circumſtances. On the ninth of *November* laſt the iſſue was found, and a final decree made in *December*; and at laſt he applied for a rehearing on the equity reſerved, in order to let himſelf into this motion. The ground for this motion is, that *Mr. Sims*, the plaintiff at law, was ſurpriſed, and the verdict obtained by ſurprize, becauſe he had no notice of the evidence; and for that reaſon he could not produce any witneſſes to encounter it. Againſt this many objections have been made, ſome general, ſome particular. The firſt general one is, that this is a trial at bar; and the old rule

(*a*) Hennel *v.* Kelland, 1. Eq. Abr. 377. Coddrington *v.* Webb, 2. Vern. 240. Stace *v.* Mabbot, 2 Vezey, 553.

(*b*) Stiles, 55.—See 3. Keb. 555. Salk. 363.

(*c*) 7. Mod. 37. Holt, 703.

is,

is, No new trial ſhall be granted after a trial at bar; and I do admit, there have been diſtinctions taken between *trials at bar* and *niſi prius*, becauſe they are conſidered as ſubordinate juriſdictions *(a)*; and new trials are not very antient. The firſt one reported is the caſe of *Wood v. Gunſton*, in the thirteenth year of *Charles the Second*. But THE LORD CHIEF JUSTICE uſed to ſay, he doubted whether they were ſo modern as is generally thought, becauſe giving a verdict before in the ſame cauſe was a good challenge to a juryman. But I am not clear of this, becauſe it might happen on a *venire facias de novo*. However, this matter was ſolemnly ſettled in the caſe of *The King v. The Corporation of Bewdley* (*b*), where the jury gave a general verdict, contrary to the direction of the Court; and eleven Judges againſt MR. JUSTICE JOHN POWELL agreed, that a new trial ſhould be granted.

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Stiles, 462—6.

Another general objection is, that it is contrary to the rules of the common law. And I take it to be ſo; for the rule there is, that no new trial ſhall be granted for want of attendance of witneſſes; and the reaſon is plain, becauſe iſſue is joined, and the point fixed in the pleadings; and nothing but that fact appears; and great variety of facts and circumſtances may be material; and neither ſide is bound to give notice: and it is impoſſible to know on what the verdict is founded; and if new trials were to be granted on theſe cauſes, nine verdicts in ten would be ſet aſide, and nothing could be reduced to a certainty; and if thoſe circumſtances were laid aſide, yet the jury might find the ſame verdict, and ſo every time one's caſe would be weaker, and nobody can tell whether the jury founded their verdict upon this or that piece of evidence.

It is ſaid, and with reaſon too, that there is a difference between a trial at law and an iſſue directed by this Court, becauſe the latter is to ſatisfy the conſcience of the Court; and the parties do not come to that trial with the ſame uncertainty as at law: and to be ſure this is reaſonable; for when the matter has been examined into here, and new evidence produced at the trial, it is but juſt to grant a new one. But I ſhould not grant a new trial on a motion grounded on affidavits; for let me be never ſo clear in it myſelf, I would have the opinion of the king's bench to know if what was contained in the affidavits as the ground for the new trial weighed with the jury. In the preſent caſe, there is no occaſion to do that. Conſider what it is. It is ſaid, there was evidence produced to prove an *alibi* on *Vere* that he was beyond ſea; and in order to lay any foundation for a new trial, it muſt be proved, that the verdict was obtained by ſurprize; but this is deſtroyed by the evidence of *Walbridge*, the plaintiff's own witneſs, who ſwears, that the deponent told *Sims* that he was afraid it would be proved that *Vere* was abroad; and this is full notice that he had reaſon to think *Vere* was abroad. But it may be objected, that this was a general notice that *Vere* was abroad,

(*a*) Attorney General *v.* Montgomery, 2. Atk. 378. Baker *v.* Hunt, 1. Vezey, 28

(*b*) 1. Peer. Wms. 207. S. C. 2. Ld. Ray. 1359.

but

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but not where he was. But a clear anſwer ariſes to this from the affidavits themſelves, for he ſwears he ſhipped himſelf in *The Triumvirate*, bound to *Cork*, and from thence to *Liſbon*; and that neither *Vere* nor *Hayman* was on board. This is the man who gave him the information; and can I be induced to believe he did not give him the full one? *Walbridge* was a witneſs at the trial, and was it not the eaſieſt thing imaginable to call him in and examine him to this point? And this takes away the moſt material part of their caſe.

If this be ſo, conſider how it correſponds with the other objection, that theſe new trials would be introductive of perjury; conſider how many contrary affidavits have been read in this cauſe. But there is one thing deſtroys the credit of the evidence with me, and that is, that thoſe witneſſes who ſwear that *Vere* or *Hayman* were not aboard in *The Triumvirate*, were not themſelves of the ſhip's crew at that time: and this ſhews the great practice there has been in this caſe.

There is a caſe which has been mentioned, *The Attorney General v. Montgomery (a)*, laſt *Michaelmas Term*, in this court; but it ſtands on different circumſtances, and was then diſtinguiſhed by me. I was then aware of the inconveniencies ariſing from new trials, and I took notice of thoſe relating to perjury; but what I grounded my opinion on was, that the new evidence was evidence in writing, and could not introduce perjury, and letters too in the plaintiff's hands, which he ſhould have diſcloſed, and wrote by the witneſſes who were examined in the cauſe: ſo that this caſe is no authority as to the preſent queſtion.

Another reaſon, which has not been taken notice of at the Bar, why a new trial ſhould not be granted, is, becauſe this motion is for a new trial for the plaintiff at law, and he had it in his power to have helped himſelf: he might have been nonſuited, and ought to have made a default; and nothing is more common than to ſay, "We are "ſurprized, and will not appear." It is true, at common law there cannot be a new trial on the ſame action, but he may bring a new one; and here he ought to have made a default; and I ſhould not have bound him down by it, nor thought it ſufficiently tried, Under all theſe circumſtances, there is no ground for a new trial *(b)*.

(*a*) 2. Atk. 378. (*b*) Prec. Chan. 193.

Caſe 120.

——— *againſt* Fitzgerald.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

AN ACTION was brought upon a policy of inſurance by the truſtee, the truſt being declared upon the policy itſelf; and it was now moved, that the truſtee, though a plaintiff in the action, might be received as a witneſs upon the trial at law.

HARDWICKE,

HARDWICKE, *Lord Chancellor.* Where policies of insurance have been made to *A.* to the use of *B.* the legal interest being judged to be in *B.* *A.* the trustee has been admitted at law to be a witness; but where the trustee has the legal estate, and the action has been brought in his name, he can never, to be sure, be admitted as a witness upon any of the principles of law. A defendant in this court, no doubt, can apply in this court to have the plaintiff's trustees examined in the cause; but I am afraid it is not so where the plaintiff comes to have himself examined, though he is a trustee. This should have been mentioned at the hearing of the cause; and then if I had been told that you must bring actions upon the policy, and should have occasion to examine the trustees, I would have directed an issue, and have given liberty to have the trustees admitted as witnesses; but I cannot do this upon motion, when the cause is out of court.

against FITZGERALD.

IT WAS THEN MOVED, that the depositions of several witnesses examined in this cause, and now abroad, might be received as evidence at law. And his Lordship said, it was now the constant practice in the courts of law to admit such depositions in evidence, where the witnesses were abroad.

Thornhill *against* Evans.

Case 121.

In Chancery, Trinity Term, 15. & 16. *Geo.* 2.

THIS was a bill by the plaintiff to have an account of the several sums of money paid to the defendant under the pretence of principal and interest, and interest upon interest, and double interest, and to be relieved against that sort of imposition founded upon the necessities of the borrower; and also to be relieved against a grant in fee of the stewardship of a manor belonging to the plaintiff, and obtained from him by surprize.

If a mortgagee take advantage of the necessities of a mortgagor, and thereby increase the rate of interest on the money lent, and obtain the grant of a stewardship, a court of equity will afford relief (*a*).

S. C. 2. Atk. 330.

The plaintiff being seised in fee of the manor of *Hebden*, in *Suffolk*, of the yearly value of seven hundred pounds, and being applied to by the defendant to appoint him to be steward of the court-leet and court-baron, answered, that he had already appointed the defendant's father to the stewardship, but that if his father would consent, he would appoint the defendant to be steward. The father consented, and a deed or instrument was drawn of the stewardship of both courts *in fee*, without the plaintiff's knowledge, being never so much as asked to make a grant in fee of it, or without any agreement or instructions given by the plaintiff about it.

Before this, the plaintiff having occasion for four thousand pounds applied for it to *Mr. Evans* the father, who had been his attorney, and *Mr. Evans*'s son, the defendant, advanced it; for the securing

(*a*) See Offulton *v.* Yarmouth, Moseley, 247. Mitford *v.* Featherstone, 1. Salk. 449. Broadway *v.* Morecroft, 2. Vezey, 445.

whereof

THORNHILL *againſt* EVANS.

whereof *Mr. Thornhill* executed deeds of leaſe and releaſe, the money bearing intereſt at the rate of four pounds and a half *per cent.* Some time after, a further ſum of ſixty pounds was advanced by the defendant, and ſecured by indorſement upon the mortgage without any rate of intereſt ſpecified. Ninety pounds ſoon after became due for half-a-year's intereſt, and the defendant inſiſted upon having that made principal; and it was indorſed to carry intereſt alſo. Upon the tenth of *November* 1734, a year's intereſt became due, which, together with the intereſt of the ſixty pounds and ninety pounds, and a freſh ſum of forty pounds, were made principal, not at the rate of four and a half *per cent.* but of five. Things were carried on in this way till 1738, when there was an account brought in to the amount of five thouſand one hundred and ninety pounds. The plaintiff finding himſelf involved gave notice to the defendant, that at the end of ſix months he would pay him off the money due, for he purpoſed to ſell his eſtate, and therefore deſired the defendant to ſhew the title-deeds to the purchaſor, who told him, he would not do it unleſs the plaintiff would give him double intereſt for the laſt half-year; and the plaintiff accordingly paid one hundred and ninety pounds, called "advance intereſt." Upon this the deeds were produced, the title looked over and approved, and the purchaſe-money ready on the twenty-ſecond of *May*, the day of notice; but then the defendant ſaid, he had buſineſs in the country, and could not come to town to receive the money. Several letters were wrote to him, and at the latter end of *June* the defendant ſaid he would receive his money in the country, which was ſent; but then he refuſed to execute unleſs he had intereſt until the twenty-ſecond of *May*, the day of notice, and then intereſt both upon the principal and intereſt down to the latter end of *June*, at five *per cent.*; which was complied with, and the deeds executed.

HARDWICKE, *Lord Chancellor.* I am of opinion, that the plaintiff is clearly intitled to relief upon the ſeveral parts of his caſe.

The firſt and principal matter is, that of the mortgage made by the plaintiff to the defendant for four thouſand pounds, with intereſt after the rate of four and a half *per cent.* The ſeveral points upon which relief is prayed upon that mortgage are, in the firſt place, to be relieved againſt ſeveral computations made from time to time of intereſt, and of turning that intereſt into principal, and making *Mr. Thornhill* pay for the ſame after the rate of five *per cent.*

In the ſecond place, to be relieved againſt the ſum of ninety pounds received by the defendant from the plaintiff in the name of ſix months intereſt by way of advance, and now ſaid by the defendant to be received upon another account.

In the laſt place, to be relieved againſt the computation of intereſt upon intereſt from the twenty-ſecond of *May* down to the latter end of *June*, when the mortgage-money was paid off.

As

As to THE FIRST of theſe, it appears by the indorſements that computations of intereſt have been frequently made, and thoſe turned into principals at the rate of five *per cent.* though the mortgage-money bears only four and a half. To juſtify theſe converſions of intereſt into principal it is ſaid, and in ſome inſtances it is true, that freſh money was advanced, and that it is but reaſonable to unite the freſh money and the arrears of intereſt, and to make them principals *(a)*; that if a mortgagor do not pay his intereſt punctually, and the mortgagee demand it, it will in ſuch caſe alſo be lawful, upon the agreement of the parties, to make ſuch intereſt and principal by indorſement. And it is true it may be done, though it is always taken to be evidence of oppreſſion, eſpecially unleſs new money is advanced, or there are great arrears of intereſt; but here intereſt is made principal ſome time, when there was but half-a-year behind; and where a man is a great creditor, and advances new money, his intereſt may be commuted into principal; but whether freſh money was advanced in all the inſtances in the preſent caſe, does not appear to me. In two of them there was. But that which weighs particularly with me is, that here are not only agreements to turn intereſt into principal, but to make it bear five *per cent.* though the mortgage-money originally advanced is only at four and a half; which is a further inſtance of the power of the defendant over the plaintiff: and it is carefully mentioned in all the indorſements, "lawful intereſt." Therefore the plaintiff is entitled to relief in all the computations, and there muſt be an account of the principal of four and a half *per cent.*; and as to the new money advanced, it muſt be at five; for I cannot relieve againſt that, as the indorſements are under the hand-writing of the plaintiff; neither can I relieve againſt the intereſt made principal, for the ſame reaſon, but it ſhall only bear four and a half *per cent.*

As to THE SECOND of theſe, it appears, that the ſum of ninety pounds was paid by the plaintiff by the name of ſix months intereſt by way of advance; and as there was nothing due, the propereſt name for it is "double intereſt for half-a-year." To juſtify this, the Counſel for the defendant ſay, that *Mr. Thornhill*, as he had made *Mr. Evans* no allowance for advancing the money, promiſed ſix months advance-intereſt for it when he paid him off. But this Court will relieve againſt ſuch promiſes, for it is extortion; for *Mr. Evans* would not ſhew his deeds to the purchaſer till he was paid it. Therefore this ſum muſt be refunded with intereſt.

It is further urged in defence of this advance-intereſt, that *Mr. Evans*, the defendant, is a Counſel at the Bar; that he had often adviſed and done buſineſs for *Mr. Thornhill* without any fee; and that *Mr. Thornhill* promiſed him ſix months advance-intereſt for his trouble when he paid him off. It is pretty extraordinary, that ſix months intereſt ſhould be the exact rule of rewarding. But this Court will not ſuffer a Counſellor who is a mortgagee to

(a) See Sir Thomas Meere's Caſe, cited 1. Atk. 304. S. C. cited Caſes Temp. Talb. 40.

have

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have any ſuch allowance for his fees. Nay, this Court will not ſuffer A COUNSELLOR to bring an action for his fees, for they are rather *honorary* than *mercedes*, and he muſt take them when he gives counſel; and no bill will lie in this court for his relief if he do not. But the preſent caſe is much worſe, for *Mr. Evans* refuſed to ſhew the title deeds till he was paid this ninety pounds. And it appears in proof, that when the title-deeds were deſired to be ſeen, he ſaid, nobody would adviſe him to part with his deeds, which were a ſecurity to him for five thouſand pounds. It is ſaid, a mortgagee may refuſe, and truly, to let the deeds go out of his hands before he is paid; but no fair mortgagee will refuſe ſuffering the title-deeds to be laid before Counſel of credit.

As to THE THIRD OBJECTION; it is inſiſted by the defendant, that as ſix months intereſt of the principal was due the twenty-ſecond of *May*, he ought to have intereſt computed upon that ſix months intereſt from the twenty ſecond of *May* down to the thirtieth of *June*, when the mortgage was diſcharged; and the pretence is, that ſix months intereſt being due the twenty-ſecond of *May*, was the ſame as a new ſeparate ſum capable of bearing intereſt; but if I was to allow that, I ſhould turn intereſt into principal without the agreement of the mortgagor: therefore what intereſt has been received upon this head muſt be refunded with intereſt.

The other part of the caſe relates to a matter of leſs conſequence, but it is to be connected together with the former; and that is, the appointment of the defendant to be ſteward to the plaintiff, dated after the mortgage; and it is for the defendant to be ſteward in fee, to keep by himſelf and his heirs, or his or their ſufficient deputies, all the plaintiff's courts-leet, courts-baron, &c. in the manor of *Hebden*, in the county of *Suffolk*. This appointment in law is good as to the court-baron, for the ſtewardſhip of a court-baron may be granted to a man and his heirs, it being no judicial office, the ſuitors being the judges in every court-baron. But the appointment of the ſtewardſhip of the court-leet to *Mr. Evans* and his heirs is void, for it is a judicial office; and if it was to be granted in fee, it might deſcend to ideots, lunatics, infants, and females, who would not be able to execute it. There are, indeed, antient offices, which are judicial ones, that have been granted in fee, and yet by cuſtom and preſcription are ſupported; as the ſtewardſhip of the county of *Weſtmoreland* was granted to the *Earl of Thanet* and his heirs, and deſcended and came into the hands of females.

But the queſtion in this court will be, Whether this appointment was obtained from *Mr. Thornhill* by impoſition? And it ſufficiently appears that it was. That *Mr. Thornhill* was a man eaſily impoſed upon is manifeſt from the tranſaction of the mortgage. It is not pretended that he took notice of or read this appointment; or if he had, as he is a country gentleman, he might not underſtand it; and he might not know that this inſtrument was to give a man and his poſterity

posterity power to act as judges in his courts; and this was subsequent to the mortgage, when *Mr. Thornhill* was under the defendant's power; and as the two *Mr. Evans*'s did business for him, it was their duty to have told him the effect of such appointment. THORNHILL *against* EVANS.

I THEREFORE DECREE the appointment to be delivered up to be cancelled.

Horner *against* Bendloes (*a*). Case 122.

In Chancery, Easter Term, 15. Geo. 2. 1742.

If a *feme-sole* having 1400l. stock convey it to trustees to the use of her intended husband and herself for life, with power to dispose of 200l. this power survives to the wife on the death of her husband.

CHARLOTTE REDMAN being possessed of fourteen hundred pounds *South-Sea* annuities, on a treaty of marriage between her and *Redman* conveyed it to trustees to the use of the husband and wife for life; and if she survived her husband, to herself for life; and whether she survived or not, she was to have a power to dispose of two hundred pounds, the remainder to the husband, his executors and administrators. The wife survived her husband, who had no children by her, and intermarried with the defendant *Bendloes*; and then she and *Bendloes* made a deed, whereby they and each of them assign and make over everything *Bendloes* and his wife enjoyed in what manner soever; but there is no recital of the power.

The only question was, Whether this two hundred pounds belonged to *Bendloes*, who survived *Charlotte*, or to the plaintiff, the representative of *Redman*?

MR. CLARK insisted, that the two hundred pounds did not pass by this deed, as the deed might be fully satisfied without it; and he insisted, and cited two cases; the one determined by MR. VERNEY, the late MASTER OF THE ROLLS, and was this: *A.* having a power to dispose of four hundred pounds, and being possessed of no other fortune, made his will, and devised four or five hundred pounds, without taking any notice of his power; and it was decreed, the will was insufficient to pass the money off which he had a power to dispose. So in the case of *Tergan v. Savage* (*b*), *A.* having a power to charge some property, real or personal, MR. CLARK forgot which, with five hundred pounds to pay his debts, became a bankrupt; and it was decreed by LORD KING, that the creditors were concerned, yet the five hundred pounds did not vest in the assignees, as *A.* had not executed the power.

But it was answered, and resolved by LORD HARDWICKE, that the two hundred pounds passed by the deed; that the cases cited related only to naked powers, where, to be sure, if the power be not executed, the representative can claim nothing; but the present power was coupled with an interest. And it appears to be the intention of the parties, that *Redman* shall only have the remainder

(*a*) This case was extracted from the manuscript of MR. FRENCH. (*b*)

after

HORNER *againſt* BENDLOES.

after the two hundred pounds paid. If it had been ſaid, "the "remainder over the two hundred pounds," then clearly the wife would be entitled to it; and, conſidering this property moved originally from the wife, it would be the ſureſt thing in the world to decree it did not paſs.

Caſe 123.

Smith *againſt* Wyatt and Others.

At Lincoln's-Inn-Hall, 21 *July*, 1742.

Potatoes are only ſmall tithes, whatever may be the quantities in which they are ſown.

S. C. 2. Atk. 364.

THIS was a bill filed by the plaintiff, as impropriator, againſt the defendant, the *Vicar of Weſtham*, for an account of the *ſmall tithes* of that pariſh.

THE CASE was this: The vicarage, as well as the rectory, formerly belonged to the monaſtery of *Langthorn*, in the county of *Eſſex*. The abbot and prior received the tithes, both ſmall and great, and by way of ſtipend allowed to *the vicar* the yearly ſum of thirty-nine pounds thirteen ſhillings and fourpence. After the diſſolution of this monaſtery, the appropriations devolved to THE CROWN; and his majeſty *King Charles the Firſt*, in the fifth year of his reign, by letters patent, granted the tithes of hay, corn, wood, *et decimas quaſcunque parcel. rectoriæ de Weſtham* to ———, under whom the plaintiff claims. About two years ſubſequent to this, a grant was made by his ſaid majeſty to the then vicar of *Weſtham* of all the *ſmall tithes* belonging to the vicarage.

Upon that two queſtions aroſe:

FIRST, Whether by the firſt grant made the vicarial tithes paſſed or not?

SECONDLY, If the defendants grant be good, Whether *potatoes* are to be conſidered as *ſmall tithes?* it being in proof, that no leſs than two or three hundred acres had been ſome years ſown with potatoes in that pariſh, and no tithes ever demanded for them by *Wyatt*, the vicar, or any of his predeceſſors, till a little time before filing the bill.

MR. CLARK, *as to the firſt queſtion*, inſiſted, that as the rectorial tithes, together with the ſmall ones, came into the poſſeſſion of THE MONASTERY, they were thereby united, and afterwards THE CROWN poſſeſſed them in the ſame manner; and that therefore by the words "*et decimas quaſcunque parcel. rectoriæ*" all tithes paſſed; for, ſays he, there can be no tithes *de jure* due to the vicar, for ſuch muſt be either due by preſcription or endowment, neither of which have been proved in the preſent caſe; and that all the tithes belonging to the rectory muſt include all thoſe tithes which THE MONASTERY had enjoyed with it, which are both great and ſmall ones.

As to THE SECOND QUESTION he argued, that *potatoes* in the preſent caſe are no vicarial tithes; that tithes are denominated great or

or ſmall according to their value, and that muſt ariſe from their quantity; that quantity has changed a ſmall tithe into a great one, and *vice-verſa*. Hops are in their nature a ſmall tithe, but are in *Kent*, and where they are planted in great quantities, eſteemed a great one. *Sir Simon Degge* (*a*) ſays, "all tithes of hops, &c. are "accounted *inter minutas decimas*, and yet in ſome caſes from "their quantities are great tithes." The like is ſaid of *woad* (*b*). Six acres out of twelve thouſand were ſown with *flax*; and the queſtion was, Whether it was a great tithe? *Chief Juſtice* HOLT ſaid, that as it was ſown in a field it was a great tithe; but afterwards the other Judges, *abſente* HOLT, determined, that *flax* was in its nature a ſmall tithe (*c*), and that it was not worth their conſideration, in the preſent caſe, whether it could be altered from quantity, ſince there was only twenty-ſix acres of ground ſown, and that might belong to forty different perſons. Peas and beans ſown in gardens are ſmall tithes; *aliter* in fields (*a*).

MR. FLOYER, *on the ſame ſide*, argued, that the firſt grant, of the fifth of *Charles the Firſt*, of tithes of corn, hay, &c. paſſes all tithes appurtenant to the advowſon or rectory, though by the 43. *Edw.* 3. pl. . if the king grant a manor with its appurtenances, an advowſon appendant does not paſs; and there are ſome other caſes where things will not paſs in grants under the deſcription of appurtenances: yet he ſaid this differs from the preſent caſe; and cited *Plowden*, the *Caſe of Mines*, where it is ſaid, that though the particular ſpecies is not mentioned in the grant, yet the mine paſſes.

AS TO THE SECOND QUESTION, he cited the caſe of *Alſon v. Nicholas*, where it is ſaid, that *peas* ſowed in rows and weeded by the hand are ſmall tithes, but if ſown *ſparſim* in fields they are great ones.

THE ATTORNEY-GENERAL *for the defendant* argued, that the rectory and vicarage of *Weſtham*, before it became part of the monaſtery of *Langthorn*, was a rectory and vicarage endowed; and though there is no endowment produced, yet there has been an immemorial uſage and a continual payment of the ſtipend to the vicars. When the advowſon, at the diſſolution of THE MONASTERY, became in THE CROWN, his then majeſty made ſeveral grants, for the terms of twenty-one years, of the vicarial as well as rectorial tithes; and on the eleventh of *June*, in the fourteenth year of *Charles the Firſt*, a leaſe was ſurrendered by one of the tenants of the crown, and a grant was thereupon made to the

(*a*) Degges' Parſon's Counſellor, 197.
(*b*) Udal *v.* Tindall, Cro. Car. 28.
(*c*) Wharton *v.* Liſle, 3. Lev. 365. 4. Mod. 183. Comb. 201. 209. Carth. 263. Skin. 341. 356. 3. Salk. 349. 22. Mod. 41.
(*d*) 4. Mod. 184.

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vicar: ſince which time, the ſtipend has never been paid, but the vicar has enjoyed all vicarial tithes, excepting *potatoes*, and never received that tithe till now. The vicar is not only intitled by his grant to ſmall tithes, but by uſage; and now the queſtion is, What are ſmall tithes? *Biſhop Gibſon* ſays in his *Codex*, that corn, grain, hay, and wood, are great tithes. *Watſon* ſays, that "tithes have been generally diſtinguiſhed by their nature, and "not by their quantity; and therefore corn, grain, and hay, be-"cauſe by their nature they are gathered in large quantities, are "called great tithes." Such things as uſually grow in gardens, by their nature are uſually gathered in ſmall quantities; and from hence comes that fixed denomination, which is not to be varied from quantity or place, of tithes growing in gardens and fields. In the caſe of the *Vicar of Fulham v. the Biſhop of London and Others* (*a*), a bill was brought for potatoes, carrots, beans, peas, &c.; the defendant inſiſted, that theſe tithes being in fields, &c. were not ſmall tithes; and the Court determined, that they were ſmall tithes, excepting ſuch which grew upon the glebe land. And the winter crops of turnips, *Trinity Term*, 12. *Geo.* 2. *Willis v. Paine and Underhill* (*b*), took from *Chief Baron* COMYNS's notes. It is true, ſome opinions have been, that the diſtinction of tithes ariſes not from the nature of the things tithe-able, but from the quantity. But in *Wharton v. Liſle* (*c*), the Bench of Juſtices being of a contrary opinion, and differing from HOLT, *Chief Juſtice*, he afterwards ſo far yielded to it as to be abſent when judgment was given, which he never would have been had he continued of a different opinion. There the Juſtices held, that quantity made no difference; and this, ſays COMYNS, ſeems to be the moſt reaſonable opinion, becauſe the quantity being undeterminate, it would create great controverſy what ſhould be great and what ſmall.

MR. MURRAY read a note of BARON PRICE's, that *hops* had been determined to be a ſmall tithe. *Owen*, 74.

HARDWICKE, *Lord Chancellor*. If there had been no vicarage, all tithes had been granted; but in this caſe there was one endowed, by which the vicarial were ſeparate from the rectorial tithes; and therefore the grant made to the plaintiff does not paſs all tithes. The abbot, &c. were the appropriate rectors and vicars, for a vicarage may be appropriate to a monaſtery as well as a rectory, *Cro. Jac.* 516.; and compoſition was made between them and the vicars for a yearly penſion in recompence of tithes belonging to the vicarage; and ſuch compoſitions were very frequent before the reſtraining ſtatutes. When it came into the poſſeſſion of THE CROWN, there were leaſes made of the vicarial tithes; which ſhews it was a diſtinct eſtate, and ſeparate from the rectorial; ſo that you need not ſpeak farther to that point.

(*a*) In the exchequer, Hilary Term 1705.

(*b*) Comy. Rep. 633. Bunb. 344.

(*c*) 3. Lev. 365. 4. Mod. 183. Comb. 201. 209. Carth. 263. Skin. 341. 356. 3. Salk. 349. 12. Mod. 41.

MR.

MR. CHUTE. This tithe is to be determined by its nature or quantity. It is in its nature a ſmall tithe; and if quantity might make it otherwiſe, that may differ each year, and ſo be a perpetual occaſion of controverſy. If corn was to be ſown in a garden, it would, notwithſtanding, be a great tithe; ſo that place cannot alter the nature of the tithe. Peas and beans planted in great quantities are conſidered as grain; when in gardens or ſmall quantities, they are in the nature of herbs; the caſe of *Bedingfield v. Freake* (*a*).

MR. BROWN. Tithes are ſmall or great according to their nature (*b*). The nature, and not the value, makes the tithe. *Saffron* is ſaid to be a ſmall tithe, though of greater value than the corn in the ſame pariſh. Clover, as it partakes of the nature of hay, is great tithe; if it grow for ſeed, it is ſmall tithe; and therefore it does not take its ſpecies from place. Turnips are ſown in very great quantities and in fields, and yet they are a ſmall tithe.

MR. BROWNING argued *ab inconvenienti*, that tithes muſt be in their nature ſmall or great, and not to be varied by quantity and place.

MR. MURRAY read a note of CHIEF BARON COMYNS's, in which it was ſaid, that where tithe is in its nature ſmall tithe, it cannot be altered by the place of planting. Vetches and acorns, if not green, are ſmall tithes; *aliter* great ones.

HARDWICKE, *Lord Chancellor*. I am of opinion, that *potatoes* are in their nature ſmall tithes, and that they are not altered by quantity or place. The original diſtinction was from quantity, and the denomination ſtill remains, and cannot be varied; as wood and corn, &c. were called great tithes, becauſe there were great quantities; and ſo *vice verſa*. When new things were introduced, it was conſidered what ſpecies of tithe they were moſt analogous to, and ſo were determined to be great or ſmall tithes. In the caſe of *Udall v. Tindall*, in *Hutton*'s *Reports* (*c*), the point was not determined, but incidentally ſaid. In the caſe of *Wharton v. Liſle* the queſtion was, Whether flax was great or ſmall tithe? And it ſeems to me, that HOLT, *Chief Juſtice*, had acquieſced with the three other Judges in their opinion, for if he had not the three other Judges would ſcarcely have given their judgment in his abſence, and contrary to his opinion upon the firſt hearing. As to the diſtinction of tithes growing in fields and gardens, that would be inconvenient, for about *London* a great part of the land is taken into gardens; and it would be extraordinary, that *peas*, &c. ſown in ten acres of land called garden ſhould make it ſmall tithe, and that five acres in a field ſhould make it a large tithe. In *Linton*'s *Caſe*, garden peas

(*a*) Moor, 909. Goldſb. 149. Cro. Eliz. 467.

(*b*) See Ward *v.* Britton, Cro. Jac. 515. 2. Roll. Rep. 97. 127. Palmer. Rep. 113. 219. Watſon, 392.

(*c*) Hutton, 77. S. C. Cro. Car. 28.

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were planted in a field, and ſown in rows, and they were held ſmall tithes. If the rule was from quantity, it would produce great uncertainty, for things may vary by the extent of the cultivation of them; and what part of the pariſh ſown muſt turn the ſmall tithes into great, or *vice verſa* the great tithes into ſmall, would be uncertain. In a pariſh chiefly grazed, and very little corn ſown, why, by that reaſoning, would not the corn be turned to a ſmall tithe? It may be ſaid, that changing their manner of cultivation may reduce rectories or vicarages to little or no value; and it may be ſo, for tithes are a changeable, tranſitory, and fluctuating inheritance, and in their nature uncertain; and it is a contingency that attends all things of that nature; and that a purchaſor muſt conſider, and whether the land is likely to vary in its product or not. Admitting the plaintiff would have made potatoes a great tithe for the quantity of them, he ſhould have ſhewn what proportion the ground ſown bears to the reſt of the land in the pariſh.

The bill was diſmiſſed.

Caſe 124. Clark *againſt* Peryam (*a*).

In Chancery, Trinity Term, 15. & 16. Geo. 2.

If a bill to ſet aſide an annuity *pro turpi cauſâ* charge generally that the annuitant was a lewd and infamous woman, the plaintiff may examine to particular acts of lewdneſs and infamy.

S. C. 2. Atk. 333.

THE QUESTION upon a rehearing of this cauſe was, Whether a plaintiff who comes to be relieved againſt an annuity *pro turpi cauſâ* (*b*), and charges for that purpoſe in the bill generally, that the annuitant *Mrs. Clarke*, before *Mr. Peryam*'s, the grantor's, being criminally acquainted with her, was a lewd and infamous woman, can examine to a particular fact, as that *Mr. Abingdon* lay with her before *Mr. Peryam*? and, Whether ſuch particular facts muſt not be charged expreſsly in the bill, that the party may have an opportunity to controvert ſuch charges, and thereby have proper notice, from the framing the bill, to defend herſelf?

MR. CLARKE argued, that if a party might examine particularly to ſuch general allegations in a bill, no character could ever be ſafe, and the party charged with lewdneſs would have no opportunity of defending herſelf, or of examining witneſſes to contradict ſuch particular facts; that upon general charges againſt characters they ought to examine generally, as that ſhe was a lewd infamous woman, and not give in evidence ſpecial ſtories of lewdneſs, unleſs they had been ſtated in the bill; that in the courts of law, if you are willing to take away the credibility of a witneſs before a jury,

(*a*) This caſe was tranſcribed from the manuſcript of MR. SALT. MSS.

(*b*) See Whaley *v.* Norton, 1. Vern. 483. Mathew *v.* Hanbury, 2. Vern. 187. Bainham *v.* Manning, 2. Vern. 242. Spencer *v.* Hayward, Prec. Chan. 154. Gray *v.* Rooke, Caſes T. T. 153. Annandale *v.* Harris, 2. Peer. Wms. 432. Lady Cox's Caſe, 3. Peer. Wms. 339. Robinſon *v.* Gee, 1. Vezey, 254. Prieſt *v.* Parrott, 2. Vezey, 160. Walker *v.* Perkins, 3. Burr. 1568. Hill *v.* Spencer, Amb. 641. *Ex parte* Cotterell, Cowp. 742.

you

you cannot charge the witneſs with particular acts of diſhoneſty, becauſe he has no opportunity to contradict them, and it would be a ſurpriſe upon him; and therefore you are only to ſpeak in general, that he is a man of bad reputation, &c. without going into inſtances upon which you found your belief of ſuch witneſs's diſhoneſty, bad reputation, &c. In the caſe of *Lord and Lady Doneraile*, 1735-6, *Lady Doneraile* brought her bill to have the benefit of a deed whereby three hundred pounds a-year had been given to her for pin-money. *Lord Doneraile*, the defendant, put her upon the proof of the execution, and added, if the deed was executed it was an impoſition upon him, and obtained fraudulently; and further, that the plaintiff's behaviour in the point of duty and virtue to him was ſuch as did not entitle her to relief in equity; that bill was framed like the preſent. *Lord Doneraile*, upon this general charge, examined ſeveral witneſſes, who proved a criminal converſation, eſpecially with one *Mr. Barry*. Theſe depoſitions were read in *Ireland*, and thereupon the bill diſmiſſed; but as no fact in relation to her unchaſtity was put in iſſue, whereby ſhe had no opportunity to defend herſelf, ſhe appealed to the lords here; and the depoſitions upon which the decree was founded in *Ireland* were refuſed to be read here, and the decree in *Ireland* reverſed; and as far as one can conjecture, the opinion of THE LORDS was, that particular facts were compriſed in the depoſition which *Lady Doneraile* had no opportunity to object or to defend herſelf againſt. And this caſe was never impeached as to its authority, and is very like the preſent one.

MR. MURRAY argued on the ſame ſide, that the caſe of *Lord and Lady Doneraile* was cited by MR. CLARKE from the printed caſes, which are falſe; and as he himſelf was Counſel in that cauſe in the houſe of peers here, he cited it from the pleadings themſelves thus: That *Lady Doneraile* charges by her bill for pin-money, that after her marriage to his Lordſhip ſhe always behaved herſelf with the utmoſt duty, tenderneſs, and affection to her lord; in the anſwer, *Lord Doneraile* denies, "that ſhe behaved herſelf with duty and "tenderneſs to him as became a virtuous woman, much leſs his "wife." Upon this general charge, what might the party give in evidence? Why, that ſhe did not behave as a dutiful wife or a virtuous woman. And this ſort of evidence was admitted in *Ireland*. Upon appeal it was fully debated in the Houſe of Lords here, and the evidence was refuſed, becauſe characters would be very precarious, and in great danger, if ſuch particular ſtories were to be given in evidence upon general allegations only, and it would be impoſſible to make any defence againſt them. That the party might have expreſſed particular inſtances of lewdneſs in the bill, and it would have been expunged by the Maſter, becauſe they are relevant to the caſe, and are the very facts upon which the party founds his equity; as in *Chapman v. Bliſſet*, in LORD TALBOT's time *(a)*. That in indictments, the fact muſt be ſtated circumſtantially, that the party may have the beſt opportunity of defending

(a) Caſes Temp. Talb. 145. 2. Eq. Abr. 341. 703.

CLARK against PERYAM.

himſelf; and an indictment for murder generally is bad, and you cannot give the particular tranſaction of the murder in evidence upon that general charge. That in an indictment for barratry, the charge, indeed, is general, becauſe barratry is a compound offence, and made up of many facts; but there the priſoner has an equivalent advantage to particular deſcriptions in other indictments, for he has articles delivered to him before his trial which contain all the facts that are to be given in evidence againſt him, and thereby he has an opportunity to defend himſelf.

MR. ATTORNEY-GENERAL in ſupport of the evidence ſaid, that the caſe of *Lord and Lady Doneraile* was truly ſtated, but the reaſon of reverſing the *Iriſh* decree, and refuſing the evidence of particular acts of lewdneſs, was, becauſe the word "virtue" did not ſufficiently put her chaſtity in iſſue, for that word is an undeterminate one, and women have many other virtues beſides chaſtity; and that upon ſuch a general charge *Lady Doneraile* was not obliged to underſtand it as any impeachment of her chaſtity; though it was urged, that virtue, applied to married women, muſt mean chaſtity; that none of the Counſel for *Lady Doneraile* would have thought the evidence improper, if the bill had charged her with lewdneſs or adultery expreſsly. The caſe of *Sydney v. Sydney* (*a*), heard firſt at THE ROLLS, and afterwards before LORD TALBOT, upon an appeal, where the decree of THE MASTER OF THE ROLLS was affirmed, was thus: *Mrs. Sydney* brought a bill againſt her huſband to have the benefit of ſome marriage-articles in relation to falling timber. *Mr. Sydney* inſiſted, by his anſwer, that ſhe ought not to have what ſhe prayed, becauſe of her miſbehaviour and miſconduct towards him as a wife; and upon this charge, *Mr. Sydney* gave in evidence acts of unchaſtity with two or three perſons, particularly the being tumbled down a *Welſh* mountain and kiſſed, &c. And the Counſel for *Mr. Sydney*, in order to have this evidence read, argued, that the words in the bill were a ſufficient impeachment of *Mrs. Sydney*'s chaſtity, and put her adultery in iſſue. THE MASTER OF THE ROLLS, after great conſideration, was of another opinion, and refuſed the evidence to be read. Upon this there was an appeal to LORD TALBOT, who was of opinion, the words were too general to put *Mrs. Sydney*'s chaſtity in iſſue; but it was never doubted, that if it had been ſufficiently put in iſſue, but that ſuch evidence might have been read. MR. ATTORNEY ſaid, he cited this from his memory only, and was not ſure whether he ſtated the very words of the bill.

That caſe is not like that of a ſuit in the ſpiritual court for a divorce *à menſâ et thoro*; for there particular inſtances muſt be inſerted in the pleadings. If a perſon bring a bill to ſet aſide a deed for fraud generally, the plaintiff may give in evidence particular acts of fraud, without charging them ſpecially in the bill.

(*a*) 3. Peer. Wms. 269. 2. Eq. Abr. 29. 728.

The

The caſe of indictments is very foreign, being for criminal proſecutions, where the party is to have all advantages, he being in danger of his life or ſome bodily puniſhment. At common law, a man may plead that he is ſeiſed in fee general, and yet may give any deeds in evidence to prove ſuch ſeiſin, without enumerating ſuch deeds, and may carry his title through ſeveral deſcents; and the other ſide has no notice of this before the trial; and he may object, that if he had had notice he might have gone into evidence againſt it.

Upon this re-hearing, THE COURT thought the objection to be a point worth conſidering of, and accordingly the cauſe was ordered to ſtand over; and at the *Seals of Lincoln's Inn Hall after Trinity Term, 27th July* 1742, his Lordſhip delivered his opinion.

HARDWICKE, *Lord Chancellor.* This evidence ought to be read, and it was properly done ſo upon the original hearing. The objection which was made againſt it was, that the particular fact of lewdneſs to which the witneſſes depoſe, was not ſufficiently put in iſſue by the pleadings. In order to conſider this queſtion, it will be neceſſary to ſee, what it is that is put in iſſue by the pleadings, what it is that the witneſſes are examined to, and what is the nature of the preſent ſuit. With regard to the nature of the ſuit, this is a bill which is brought by the plaintiff to have a ſatisfaction for a bond whereby *Mr. Peryam* agreed to pay the plaintiff an annuity of ſixty pounds for the life of the annuitant, not to commence however till *Mr. Peryam*'s deceaſe. And the bill is brought in order to have a ſatisfaction for this bond out of his perſonal aſſets. There is a croſs-bill brought by the defendant, whereby it is prayed, that this bond may be delivered up, the conſideration thereof being a *turpis cauſa*, for that *Mrs. Clarke*, the plaintiff to the original bill, was a woman of a lewd life and converſation, and that therefore this is ſuch a bond as ought to be relieved againſt. The manner in which this lewdneſs is charged in the croſs-bill is, *that* Anne Clarke *was a lewd woman, and of an infamous character, before* Zachariah Peryam *became acquainted with her.* And it is inſiſted on by the plaintiff in the original bill, that under this general allegation the plaintiff in the croſs-bill is not entitled to examine to anything but to the general character of *Anne Clarke* concerning lewdneſs. The foundation of this objection is, that it is impoſſible for a perſon to be prepared to anſwer particular facts until they were ſpecified in the pleadings. And the Counſel for the plaintiff have likened the preſent caſe to the general rules of law concerning examinations to the characters of witneſſes or to the characters of parties. It has been ſaid, that a general character indeed, both of witneſſes and parties, perſons may be ſuppoſed to be able to ſupport, though nothing is hinted at in the pleadings, even in a general manner, againſt them; but that particular facts they cannot be ſuppoſed to be able to give an anſwer to, unleſs thoſe very facts are expreſsly enumerated in the pleadings But notwithſtanding this objection, I AM OF OPINION, in the

CLARK *againſt* PERYAM.

preſent caſe, that the plaintiff in the croſs-cauſe was well entitled to examine to the particular acts of lewdneſs committed by *Anne Clarke*. And in order to determine this point, I ſhall conſider the authorities upon this ſubject, and then endeavour to ſhew how they are ſupported by the reaſon of the thing. The firſt caſe of this nature is in 1. *Vern.* 483. There the words of the Book are, "THE MASTER OF THE ROLLS ſaid, that there would be a dif- "ference in theſe caſes between a contract executed and executory; "and that this Court would extend relief as to things executory, "which if done it may be might ſtand; but as that caſe was, he "ſaw no ground to relieve the plaintiff," nothing appearing to him but that it was a free and voluntary gift, without anything of a *turpis contractus*; and in caſe it had been ſo, we know that *Adam* was puniſhed, though tempted by *Eve*, becauſe he would be tempted. That if it had been charged in the bill, *that the defendant was a common ſtrumpet, and commonly dealt and practiſed after that ſort, and uſed to draw in young gentlemen*; in ſuch caſe he thought it reaſonable to relieve; and the plaintiffs had in that cauſe proved as much; but the defendant's Counſel oppoſed the reading to that matter, by reaſon it was not charged in the bill, nor in iſſue in the cauſe; ſo they prayed liberty to amend their bill, and to charge that ſpecial matter, paying the coſts of that day, and of the depoſitions taken in the cauſe. By this caſe it plainly appears, that the apprehenſion of the Court and the Counſel there was, that if the lewdneſs of a plaintiff is put in iſſue in the pleadings, evidence may be given of particular acts of lewdneſs; for all that was inſiſted on there was, that the lewdneſs of the plaintiff was not put in iſſue. The next caſe which is proper to be mentioned is that of *Atkins v. Farr (a)*, determined in this court the twenty-eighth of *February* 1738: There the charge in the bill was ſomething to the ſame effect as in the croſs-bill in the preſent caſe; and notwithſtanding the bill was in that general manner, evidence was given of ſpecial acts of lewdneſs with different perſons; and no objection was made to the reading that evidence: and to the like purpoſe is the caſe of *Robinſon v. Cox*, determined in this court the thirteenth of *July* 1741 *(b)*. Another caſe cited at the Bar was that of *Sydney v. Sydney*. That caſe came firſt of all to be heard at the Rolls, before SIR JOSEPH JEKYLL in 1727, who took time to conſider of it, but by means of ſome accident or other did not give judgment in it till 1732. That was a bill brought by *Mrs. Sydney* againſt her huſband, the preſent *Earl of Leiceſter*, in order to have an agreement carried into execution which he had entered into with her. In bar of this relief, there were two things which the defendant inſiſted on in his anſwer. The one of thoſe was, that the plaintiff had not offered by her bill to perform her part of the articles; and the other, *that ſhe had much miſbehaved herſelf, and that he was forced to leave her*. The defendant entered into proof, and produced evidence that ſhe had been guilty of adultery. On the hearing of

Sidney *v.* Sidney, at the Rolls, 1732.

(a) S. C. 1. Atk. 287. (b) Ante,

that

that cauſe, an objection was made, that the evidence ought not to be read. His Honour took time to conſider of it; and on the twenty-ſeventh of *February* 1732 he delivered his opinion. With regard to the firſt part of the defence which was made by the anſwer, he laid that out of the caſe, for his opinion was, that the Court might take care that ſhe ſhould perform her part of the agreement as well as that he ſhould perform his. But as to the other defence his opinion was, that the evidence ought not to be read; and the reaſon which he gave for it was, that the anſwer had not put the charge of adultery in iſſue; for though it was ſworn by the anſwer, that the plaintiff had miſbehaved herſelf, and that the defendant was forced to leave her, yet His Honour ſaid, ſhe might miſbehave herſelf in various ways without being guilty of adultery. This opinion of THE ROLLS was undoubtedly a right one; for certainly the charge of lewdneſs muſt be alledged in a general manner in order to let in evidence of this ſort. The principal authority which has been relied on by the plaintiff in the preſent caſe is that of *Lord and Lady Doneraile*. That was a cauſe in the court of chancery in *Ireland*; and from the decree there an appeal was had to the Houſe of Lords here in 1735. That was a bill brought by *Lady Doneraile* againſt *Lord Doneraile*, who was her huſband; and one allegation in the bill was, that ſhe had all along behaved herſelf with duty, tenderneſs, and affection, towards her lord. To this bill the defendant put in his anſwer, and thereby, among other things, inſiſted, *that ſhe had not behaved herſelf with that duty, tenderneſs, and affection, as became a virtuous woman, much leſs his wife.* After putting in this anſwer, the defendant examined his witneſſes, and proved, that ſhe had been guilty of a criminal converſation with *Barry*. That cauſe came on to be heard in the court of chancery in *Ireland*, where this evidence was allowed to be read. From that decree an appeal was brought to the Houſe of Peers here, where an objection was made, that that evidence ought not to be read; and the Houſe was of opinion it ought not. I was not preſent in the Houſe of Lords when they gave their opinion; but from what appears by the printed caſe, there was ſomething to diſtinguiſh that caſe from the preſent one. For there it was alledged, that in the caſe of *Lord Doneraile* there was not even a general charge of adultery or incontinency in *Lady Doneraile*, the plaintiff. For there may be many other inſtances wherein a wife may be guilty of the want of virtue towards her huſband without the act of unchaſtity; which circumſtance diſtinguiſhes that caſe from the preſent one, for here the general charge of lewdneſs is expreſsly alledged. This is as much as neceſſary to be obſerved with regard to the authorities and precedents of the Court; and it appears thereby, that it has been the uniform ſenſe of the Court, that it is ſufficient to make a general allegation of lewdneſs in order to let in particular proofs of it; and if the contrary was neceſſary, it would be a means of having ſuch facts inſerted in bills and anſwers as would tend to great indecency.

CLARK *againſt* PERYAM.

Lord and Lady Doneraile, Houſe of Lords, 1735.

I ſhall,

CLARK *against* PARYAM.

I ſhall, in the next place, conſider how theſe caſes are ſupported by the reaſon of the thing. And as to that, it ſeems in itſelf to be a thing that is reaſonable, that upon ſuch a general charge the party ſhould be allowed to give evidence of particular acts of lewdneſs. By the ordinary rule of law, a proſecutor is not allowed to give evidence in ſupport of the characters of his witneſſes, unleſs the other ſide produces ſome evidence in order to impeach their characters. If indeed the defendant do give ſuch evidence, that is conſidered as a challenge to the proſecutor to ſupport their characters. But theſe rules concerning evidence to the characters of witneſſes or parties hold only in thoſe caſes where the queſtion concerning the character comes in collaterally from the evidence, and does not ariſe from the face of the pleadings; and where that is the caſe, there ſeems to be a very good reaſon why the Court ſhould be cautious in allowing of evidence which is relative to character. But where the queſtion concerning character does not ariſe collaterally from the evidence, but is pointed out by the pleadings, the objection of ſurprize in a great meaſure ceaſes. A caſe has been put at the Bar of an indictment of *barratry* found againſt *an attorney*. It has been ſaid, that the method in that caſe is not to deſcribe the particular acts which conſtitute the *barratry* in the indictment, but that inſtead thereof the proſecutor gives in articles to the defendant, containing the particular acts of barratry which he intends to give evidence of; and from thence an argument has been drawn, that upon ſuch a general charge as is in the preſent caſe, the party ought not to be admitted to give in evidence thoſe particular facts which ſhe has done: and it is indeed true, that that is the rule relating to the indictments of barratry; but that is a ſingular caſe; and the foundation of it ſeems to be, that it is often pretty nice to diſtinguiſh what amounts to the barratry and what does not; and therefore, that the parties may be better prepared in order to ſhew what they did does not amount to it, articles of this ſort are to be delivered. But that caſe is not like the preſent one; and that which ſhews that the reaſon of theſe articles ariſes from the particular nature of barratry is, that in other indictments which are equally general, articles of this ſort are not neceſſary to be given: as in indictments for keeping a common bawdy-houſe, the charge is as general as that of barratry, and yet there articles of this kind are not required, and yet the proſecutor is allowed to give in evidence particular facts of perſons reſorting to the houſe for ſuch lewd purpoſes. So where an iſſue is tried relating to a perſon's being *non compos*, the party is not confined to give general evidence of the other's inſanity, but he may give particular acts of it in evidence. And the like rule holds where an iſſue is directed concerning another's being of a weak underſtanding; and the ſame of drunkenneſs. Theſe things ſhew, that there is ſuch a diſtinction which has been mentioned, *viz.* that where the charge is put in iſſue, though in a general manner, particular facts may be given in evidence, in order to ſupport it; but where the matter comes in only collaterally from the evidence, it cannot. For theſe reaſons I AM

OF

OF OPINION, that the evidence in the preſent caſe ought to be read, and the decree affirmed. CLARK *againſt* PERYAM.

Hall *againſt* Carter (*a*). Caſe 125.

Chancery, Lincoln's Inn Hall, Seals after Trinity Term, 15. & 16. Geo. 2.

In what caſes daughters' portions may be raiſed.

BY A WILL made in the year 1687, an eſtate was limited to *Thomas Carter*, ſon of the teſtator (and father of three ladies who were three parties to this ſuit), for life; remainder to truſtees to preſerve, &c.; remainder to his firſt and other ſons in tail; remainder to truſtees for one hundred years; remainder to the teſtator's other ſon *Cornelius* in like manner; with a remainder to truſtees for two hundred years. The teſtator declared the truſt of the one hundred years term to be, "that if there was no iſſue male "of *Thomas*, and he left daughters, the truſtees were, out of *the "rents and profits, or by mortgage*, to levy and pay to the daughters "one hundred pounds a-piece at the age of eighteen or marriage; "and moreover pay ſix pounds a-year a-piece for their mainte- "nance till the ſaid portions became payable;" and declared in the ſame manner as to the other term of two hundred years. After the limitation to *Cornelius*, then there is a proviſo containing a power for theſe ſons to make jointures. S. C. 2. Atk. 354.

Thomas made a jointure on a wife, and died without iſſue male but left three daughters, and a widow his jointreſs.

The queſtion was, Whether theſe portions are now raiſable, the daughters having long ſince attained eighteen and been married?

HARDWICKE, *Lord Chancellor*. It was ſaid, FIRST, that theſe portions cannot be raiſed ſo as to prejudice the wife's jointure. I allow that, but her jointure will not be hurt by its being antecedent to it. If the will had limited it to the ſon, and to ſuch wife as he ſhould marry for her jointure, there would be no pretence then that this term of one hundred years could affect it, for that would be to make a ſubſequent eſtate to affect and run over a precedent one. If that be ſo, it is the ſame thing when done by way of power; for as the ſon here had a power to make a jointure to take effect immediately on his death, and has executed it, it is juſt the ſame as if it had been done by the will, for it has relation to that, and ſo is precedent to the truſtees eſtate for one hundred years. 2. Vern. 458. 1. Peer. Wms. 448. 707. Amb. 335. 2. Peer. Wms. 93. 484. 1. Atk. 549. 3. Atk. 416. 3. Bro. C. C. 267. 437.

The next queſtion is, Whether theſe portions are raiſable out of this reverſionary term? or, Whether they ſhall wait till that comes into poſſeſſion? And I AM OF OPINION, that they are

(*a*) This caſe was taken from the manuſcript collection of caſes belonging to MR. PURCAS. MSS.

raiſable,

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raiſable, and ought to be raiſed, out of this reverſionary term; for this caſe is plainly diſtinguiſhable from thoſe where the Court has refuſed to raiſe portions out of reverſionary terms (*a*). Here it is no more than this: Here is an eſtate in jointure to the widow, and a term of one hundred years, which will take effect in poſſeſſion when ſhe dies, for the other contingencies have happened; and it is to raiſe one hundred pounds a-piece to the daughters at eighteen or marriage; and they have attained to eighteen, and are married. In the caſe of *Corbett v. Maidwell* (*b*), LORD COWPER went upon the particular wording of the ſettlement, that the daughters who were to receive portions were to be unmarried or unprovided for at the father's death, and the father was then living; ſo my LORD COWPER's determination was right, for all the contingencies had not happened. In the caſe of *Butler v. Duncombe* (*c*) the truſt was expreſs to raiſe portions after the commencement of the term; and therefore my LORD MACCLESFIELD held, they were not to be raiſed in the life of the jointreſs. The caſe principally relied on is *Brome v. Berkley* (*d*), where there was a power to raiſe portions for daughters at twenty-one or marriage, by and out of the rents and profits, as by mortgage or ſale, as the truſtees ſhould think fit; and in the mean time, and until the ſaid portions ſhall become payable, to raiſe one hundred pounds a-year for maintenance; the portions could not be raiſed in the life-time of the jointreſs, becauſe till her death the truſtees could not make uſe of their election in what manner to raiſe it; and the maintenance being to precede the payment of the portions, neither of them could be raiſed till the eſtate in the truſtees took effect in poſſeſſion; but apply that to this caſe, and they are not at all alike. *Mrs. Brome* was not entitled to have any maintenance till the truſtees eſtate came into poſſeſſion; and ſo it could not only not be raiſed, but could not incur till the eſtate took effect in poſſeſſion; but here it is different, for in this caſe the maintenance is a charge upon the eſtate. The truſtees are to raiſe the portions of one hundred pounds, and moreover pay ſix pounds a-year for maintenance till the portions become payable. So that this maintenance is due, and is not to be poſtponed till the term comes into poſſeſſion, or till any particular time.

I know no caſe where it is determined, that a term either in poſſeſſion or reverſion has been ſold, but yet it will run on, and be a charge upon the eſtate. So this caſe is different from *Brome v. Berkley*, for there no maintenance could incur; here it does, and is payable till the portions become payable. Then there is an objection againſt raiſing theſe portions by ſale or mortgage of the reverſionary term; for it is ſaid, that it muſt be ſold to very great

(*a*) See Stanley *v.* Stanley, 1. Atk. 549.

(*b*) 1. Eq. Abr. 337. Salk. 159. 2. Vern. 640. 655. 3. Chan. Rep. 150.

(*c*) 1. Eq. Abr. 339. 2. Vern. 760. 10. Mod. 433. 1. Peer. Wms. 448.

(*d*) Eq. Caſ. Abr. 340. 2 Peer. Wms. 484. 3. Brown's P. C. 437.

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diſadvantage, or if it be mortgaged that intereſt will run on; but there is the ſame inconvenience if it remains unſold, or be not mortgaged, for the maintenance or intereſt of the portions will ſtill be running on.

Another thing is ſaid, that by thoſe words "out of the rents "and profits, or by mortgage," election is given to truſtees, and they may do it either way. I believe this argument was relied on in *Brome v. Berkley*, but it did not turn upon that in the preſent caſe. I am not clear that the portions are not raiſable by ſale; "rents "and profits," if it went no further, would include, for a deviſe of rents and profits is a deviſe of the lands (*a*). But if they be raiſable either by ſale or mortgage, yet it is ſaid that intereſt ought not to be paid from the time the portions became payable. The proviſo is, that if the remainder-man or reverſioner pay the portions, the term is to ceaſe; and from thence it is inferred, that the reverſioner, *Eaſtcourt Carter*, may redeem the eſtate, and exonerate by the payment of the principal ſum only. But I am of opinion he cannot without payment of both principal and intereſt; for as it was the teſtator's intention that they ſhould have maintenance till the portions became payable, he alſo intended they ſhould have intereſt for their portions from the time they became payable (*b*). In the caſe of *Lord and Lady Kilmorry*, in LORD HARCOURT's time (*c*), intereſt was allowed for portions, though not mentioned; and in *Evelyn v. Evelyn* (*d*) this caſe was cited and allowed.

THEREFORE I AM OF OPINION, that theſe ſeveral ſums muſt be raiſed out of the eſtate, with intereſt from the time they became payable. And accordingly HE DECREED the maintenance of the daughters at ſix pounds a-year a-piece till eighteen or marriage, to be paid to the mother, who had maintained them; and that the maintenance and the portion, with intereſt, from the daughters ages of eighteen or marriage, be raiſed by mortgage or ſale of the one hundred years term, as ſhall be moſt for the benefit of the eſtate, and be paid to them reſpectively, or their huſbands or repreſentatives; and the truſtees have coſts out of the eſtate, and all the reſt no coſts, except the ſubſequent coſts of raiſing theſe ſums, and thoſe to be raiſed out of the eſtate.

(*a*) See Okenden v. Okenden, 1. Atk. 550.
(*b*) See 1. Atk. 548.
(*c*) 2. Salk. 538.
(*d*) 2. Peer. Wms. 591.

The Charitable Corporation *againſt* Sir Robert Sutton and about Fifty Others.

Caſe 126.

Lincoln's-Inn-Hall, 13th Auguſt 1742.

Bill to be relieved againſt committee-men for breach of truſt. S. C. 2. Atk. 400.

HARDWICKE, *Lord Chancellor*, after having taken a great deal of time to conſider this caſe, delivered the following reſolution: This was a bill brought by the Charitable Corporation againſt the defendants, being fifty in number; ſome of them as they were committee-men

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mittee-men and assistants or directors of the Corporation, and others as their officers and servants, and others as the representatives of them, standing in their capacities; and it is to be relieved, and to have a satisfaction in respect of divers frauds, mismanagements, and breaches of trust, charged on the defendants, by means whereof the Corporation has sustained many and great losses. As the transactions in which these frauds and mismanagements are alledged to have arisen take their foundation under a charter originally granted by THE CROWN, it will be proper to take notice, that by a charter of the twenty-second of *December* 1707, this society was incorporated by the title of "The Charitable Corporation for "Relief of Industrious Poor, by assisting them with small Sums "upon Pledges at legal Interest." The intent of such their corporation is properly expressed by their title; and as in all corporate bodies it is of necessity that the executive powers should be lodged in a select part of them, a committee was by the charter appointed, consisting of seven persons, who were to be invested with the management of their affairs, but subject to such restrictions as in the charter are mentioned, of which committee it is, or of the assembly substituted in its stead, called committee-men and assistants, by virtue of the by-laws of the Corporation, which by the charter they were enabled to make, that the defendants, or at least many of them, are members. By the original constitution it is provided, that the Corporation shall be enabled to raise a capital not less than twenty thousand pounds, and not more than thirty thousand pounds, for carrying on the purposes of their incorporation, which was relieving the poor by assisting them with small sums upon loans, with a power reserved to THE CROWN to enlarge their capital further: and by the charter several officers are appointed for the service of the Corporation, and among others a warehouse-keeper; and the Corporation is restrained from banking or giving out notes, except upon pledges, and even on those within the bounds of their capital. After this charter, by virtue of the power reserved, it received several subsequent enlargements of the capital by SIGN MANUAL from the crown: as in 1722 it was enlarged to one hundred thousand pounds; in 1728 to three hundred thousand pounds; till in 1730 it was enlarged to six hundred thousand pounds; which enlargements of the capital, as they were a departure from the original intent of the charter, so they were one principal handle to the abuses which have since happened. On the first obtaining the charter, it lay for some time unexecuted; but afterwards being set on foot, in *March* 1718 instructions were settled for the several officers, and by-laws were made; and among other things it was ordained, that there should be three locks upon the pledges, the key of one of them to be deposited with the warehouse-keeper, another with the cashier, and the third with the book-keeper; and no pledges were to be deposited or taken out but by using these three keys. A surveyor was also appointed, who was to attend at the warehouse every evening, and to examine the pledges, and state in his book the situation

ſituation thereof, *viz.* as to ſuch pledges as were clearly ſufficient, he was to keep one column marked (S), and as to ſuch as were dubious a column marked (Q.). He was likewiſe to ſtate the *quantum* of the loans on the pledges, and to ſign his report, and leave it every evening with the ſecretary, in order to be laid before the committee; and that this officer, as well as the three locks, were intended to be a permanent and continuing check, appears not only from the nature of his office, but from the inſtructions of the warehouſe-keeper, who was directed to permit the ſurveyor from time to time to make theſe inſpections, and if any deficiency appeared in the pledges, the warehouſe-keeper was to make it good: ſo this ſhews he was a material officer. But as it has been mentioned, that the nature of the committee was altered to a committee and aſſiſtants; ſo in proceſs of time theſe rules and orders were taken away, and the caſhier was directed to deliver over his key of the warehouſe to the accountant. In the latter end of 1725, or beginning of 1726, *John Thompſon* was appointed warehouſe-keeper; and on the thirteenth of *May* 1726, the accountant was ordered to deliver over his key of the warehouſe to one *Lovell*, an under ſervant. Whether it was ever ſo delivered over does not appear. On the twenty-ſeventh of *September* 1726, the office of ſurveyor of the warehouſe was aboliſhed, by which means all the checks were taken off the warehouſe-keeper. On the eighteenth of *November* 1726, *Woolley* and *Warren* were appointed aſſiſtants to the warehouſe-keeper *Thompſon*: and it was inſiſted on at the hearing of the cauſe, on the part of the defendants, that theſe perſons were more effectually a check on the pledges than the officers who were diſplaced; from whence it was argued, that no evil was to be imputed from the removal of the ſurveyor or reſuming the keys of the pledges. But I think it does not appear the aſſiſtants were any check at all upon the warehouſe-keeper, but to be conſidered rather as his ſervants, for they gave their ſecurity to him, and ſo were dependant upon him. From this time it is plain, the ſole power over the pledges was veſted in *Thompſon*, *Woolley*, and *Warren*; and then the great ſcene of iniquity began, and the frauds that followed in the Company's affairs. The nature of thoſe frauds as charged by the bill is as follows:

FIRST, The renewing of pledges; that is, lending new loans on the ſame pledges, without repaying on the former loan, or any examination whether the pledges were to the value of the loan or not, by which means there were new notes coined for ſuch further loan.

SECONDLY, The infamous cheat of lending, and permitting money to be lent on fictitious pledges, without any certificate of a pledge brought in; and thoſe renewed over and over again.

THIRDLY, The iſſuing notes to *Thompſon*, ſometimes on pledges of the value whereof it was his office to judge, and ſo he was in fact both borrower and lender, and ſometimes on fictitious pledges.

FOURTHLY,

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FOURTHLY, The iſſuing notes of the Corporation without purſuing the neceſſary ſteps, or having the direction of the committee.

And all this aroſe from *Woolley* and *Warren*, the aſſiſtants, being permitted to act as brokers for the borrowers, by which means three parts in four of the loans came to be in their names. On the twentieth of *May* 1726, the court of committee took notice of this as an abuſe, and that *Woolley* and *Warren* advertiſed that borrowers might apply to them for loans; whereupon the committee cenſured them, and took their words not to publiſh any more advertiſements, and ordered, that all perſons might negotiate for themſelves, or by ſuch brokers as they ſhould think fit; yet on the eighteenth of *November* 1726, they order, that thoſe very perſons, *Woolley* and *Warren*, ſhall be aſſiſtants to the warehouſe-keeper. And it is inſiſted by the plaintiff, that if the committee had not groſsly neglected their truſt, they muſt, on the ſhorteſt inſpection of the books, have ſeen, that the practice they had juſt cenſured was, notwithſtanding, kept on foot, the names of *Woolley* and *Warren* ſtill running through their tranſactions for the greateſt part of the loans. The account of the Corporation at the time of their failure ſtands thus:

	£.	s.	d.
Money lent out on pledges, - -	385,000	0	0
Value of the pledges, - -	35,000	0	0
Deficiency,	350,000	0	0
Corporation debt, - - -	192,000	0	0
So that the loſs is, - -	542,000	0	0

Under theſe circumſtances, the conſiderations material for this Court will be, the cauſe from whence this deficiency has ariſen, the ſeveral acts of the defendants, their omiſſions and neglects, and how far they may have tended to create this loſs; and whether the defendants, and any or which of them, and how far, are liable in equity to make good this deficiency. There are ſeveral perſons liable to make good the loſſes or loans upon fictitious pledges, who are certainly liable, in caſe the evidence is ſufficient to charge them; and that is a conſpiracy called "The Partnerſhip of Five, Four, and Three." As to this *Thompſon* has been examined by the plaintiffs; and he ſays, that in 1726 an agreement was entered into by *Sir Archibald Grant*, *Burroughs*, *Squire*, *Robinſon* (all then committee-men), and himſelf, that they ſhould borrow conſiderable ſums of the Company on fictitious pledges, and diſpoſe of them in the purchaſe of corporation-ſhares, which they were to ſell out again at an advanced price for their mutual benefit; *Sir Richard Grant* at the ſame time repreſenting, that he was intereſted in ſome lead-mines, which would enable them to turn the money to good account, and to reimburſe the Corporation. This aſſociation or partnerſhip,

partnerſhip, he ſays, was at firſt compoſed of thoſe perſons named before, but ſome of them dying or declining, it was afterwards reduced to four, and then to three; and he believes, that none of the committee knew of this partnerſhip, except the five, four, and three mentioned. This evidence of *Thompſon* has been read againſt the plaintiffs, and certainly might be ſo. But it is objected on the part of the defendants, that he being a party to the fraud, and having abſconded, by an act of parliament of the 6. *Geo.* 2. c. 2. ſ. 6. a reward is given to him of one fifth ſhare of ſuch effects as he ſhould diſcover and reſtore to the Corporation, and therefore he is not a competent witneſs. This is plainly a legal objection, and as ſuch was admitted. But though it is a legal objection againſt theſe five perſons, yet he is a good witneſs in regard to the plaintiff and thoſe defendants who have thought fit to read them. However, this may be a matter proper for enquiry.

The plaintiffs inſiſt, that beſides theſe partners, all thoſe who were committee-men or aſſiſtants during this time are liable to make good the loſſes occaſioned by theſe frauds and miſmanagements; and their grounds are theſe:

FIRST, That they have been guilty of manifeſt breaches of truſt and duty, by means of which theſe loſſes have happened.

SECONDLY, That if they are not guilty of any wilful breaches of truſts, yet they have been groſsly negligent; and that this negligence in ſo many inſtances is tantamount to a breach of truſt, and ſufficient to charge them.

Theſe queſtions will admit of various diſtinctions; and it will be proper to conſider, what are proper to be charged as actual breaches. They are,

FIRST, The paſſing and ſigning notes without purſuing the requiſites in the charter and by-laws.

SECONDLY, Paſſing notes on pledges, called renewing of pledges, knowing the former notes were not paid off.

THIRDLY, Paſſing notes for loans to *Thompſon*, the warehouſe keeper.

FOURTHLY, Repealing ſeveral by-laws of the Corporation, and thereby taking off the checks upon the warehouſe keeper, and putting the whole management into his power.

FIFTHLY, Making ſeveral orders, putting their affairs in the management of *Thompſon*, *Woolley*, and *Warren*, and thereby giving them frequent opportunities of committing frauds.

There were three other things inſiſted on at the hearing, which I did not take notice of before, becauſe they are matters of more doubt.

FIRST, The coining and iſſuing notes in general.

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SECONDLY, The coining and iſſuing bonds.

THIRDLY, The contract with *Robinſon* to become their banker and circulate their notes.

Now, as to the coining notes in general, power is given to do it by the charter, and it is only the *quantum* and ill application of them that creates the miſchief. So as to the bonds: Indeed there is no expreſs power given by the charter, but a Corporation may give bonds; and it is the frequency of them that creates the evil. And in like manner of the contract with *Robinſon*. The miſchief from thence ariſes from variety of circumſtances, the conſideration of which it will be proper for me to reſerve till after the enquiry which I ſhall at preſent direct.

As to the firſt three things, I AM OF OPINION that they are clear breaches of truſt.

FIRST, The paſſing notes without purſuing the requiſites in the charter and by-laws, by which they are to be ſubſcribed by one of the committee-men, which was intended as a check on the caſhier; if they are not ſo ſubſcribed, it is a breach of truſt.

SECONDLY, As to paſſing notes for renewing of pledges; if the value of the pledge was not certified, it is an expreſs breach of truſt, for it was lending double, treble, or four times the ſum, on the ſame pledge, and exceeding the value of it.

THIRDLY, The paſſing notes to *Thompſon* was a moſt extraordinary piece of fraud or groſs negligence, for it was giving him the power of valuing his own pledges, and making him both borrower and lender; and where that happens, thoſe who ſuffer it ought to be anſwerable for it.

THE FOURTH and FIFTH are of a more doubtful nature. It is certain they have tended greatly to the injury of the Corporation, but it is to be conſidered whether they are actually breaches of truſt. They will principally affect thoſe only who were preſent and concurred in ſuch meaſures; but how far others have made themſelves liable by acting under thoſe orders, is a conſideration under the head of neglect only; and certainly it was a groſs neglect.

The particular charges under the head of neglect are:

FIRST, Non-attendance on their employments.

SECONDLY, Not obſerving the orders for balancing the caſh.

THIRDLY, Not obſerving an order of the twentieth of *June* 1726 for laying accounts of forfeited pledges before the court of committee.

FOURTHLY, Not once inſpecting the warehouſe.

FIFTHLY, Suffering the ſeveral bad orders for taking off the checks to ſubſiſt, and permitting *Thompſon*, *Woolley*, and *Warren*, to act under thoſe orders.

From

From hence an accumulated charge is formed againſt all the defendants who were committee-men or aſſiſtants, by which it is ſaid, they are liable to make good the whole loſs ſuſtained by means of fictitious pledges.

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It will be proper here to conſider the employment of a director or committee-man. It is a mixed office, partly in the nature of a public office, and partly as a private office in truſt for other people. It is public, as it riſes under a charter, and as the abuſe of it tends to affect public credit. But as it does not concern public government, but the negotiation of private property, it is therefore a private office, like the directors of the *Bank*, *South-Sea*, and other trading Companies, where they are not obliged to qualify by taking the ſacrament and oaths as for a public office, but are only intruſted with the property of the aggregate body: ſo this is in the nature of a private truſt for other perſons; and in this view the committee-men are reſponſible to the Corporation for breaches of truſt, either by commiſſions or omiſſions, for acts of malefeaſance or nonfeaſance; and at the hearing *Domat* (*a*) was cited to ſhew they are reſponſible for breaches of private truſt. There is no doubt but the three firſt mentioned breaches are ſuch for which they are reſponſible; but whether the others, of repealing the by-laws, and making new orders, and how far they ſhall be called breaches of truſt, deſerves conſideration. The events do oftentimes ſhew, that the proceedings or omiſſions of perſons acting in this capacity are of evil tendency; yet it would by no means be juſt in a judge to determine from events that have happened that they might be foreſeen, becauſe if ſo, nobody would accept the direction of corporate affairs. But when there is a ſeries of neglects, and breaches of truſt are occaſioned by their abſence, then they are anſwerable for the maleſeaſance of others. How far the particular circumſtances of the ſeveral defendants may bring them within theſe reaſons, I ſhall not at preſent examine, the cauſe not yet being ripe for that purpoſe.

To the relief prayed by the plaintiffs two objections have been made by all the defendants, the committee-men and aſſiſtants.

FIRST, That they had no ſalary for the execution of their offices, and ſo ought not to be bound to ſtrict rules of judgment, as between ordinary parties in queſtions of property. As to this, there is certainly no weight in it, for if one voluntarily accepts a truſt, he muſt execute it with fidelity, integrity, and diligence; and where no allowance is annexed to the truſt when created, this Court will not make any. To this effect is the caſe of *Coggs v. Barnard* (*b*), where one undertook to remove an hogſhead of brandy out of one cellar and lay it in another, and by his negligence it was ſtaved; though he had no reward, yet HOLT, *Chief Juſtice*, held him lia-

(*a*) Domat's Public Law, lib. 2. tit. 3. ſ. 1, 2.

(*b*) Salk. 26. S. C. 2. Ld. Ray. 909. S. C. Comy. Rep. 133.

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ble (*a*); and in caſe of public directions, even where ſalaries are annexed to them, it is perhaps pretty generally underſtood, that perſons who accept theſe offices are not incited to it from the ſalary, which for the moſt part is ſmall, but have other advantages in trading Companies.

THE SECOND objection was, that the nature of this caſe is ſuch as it is impoſſible for the Court to decree for the plaintiffs on this general point of breaches of truſt and groſs neglects of the ſeveral directors, for that ſome acts are joint, others ſeparate, and each is anſwerable only for his own particular acts and neglects; and from thence there is a general inference, that this caſe is ſo complicated, and of ſuch a nature, as is out of the juriſdiction of any court of equity. If this be ſo, it is laying the axe to the root of the tree, and I have been ſtating all this to no purpoſe. But it is not ſo; for where there are many truſtees, and ſome are guilty of one breach and ſome of others, or where there is a groſs negligence, and the loſs is ſo complicated as it cannot be apportioned, I think they are all jointly liable. And I will never eſtabliſh this, that breaches of truſt, or any matters of fraud, are above the reach or out of the juriſdiction of this court. The king's courts are to redreſs every wrong and protect every innocent perſon; and if the laws do not extend to do this, new and more ample ones will be provided, for two miſchiefs are to be avoided: firſt, not to make it unſafe or too perilous for honeſt men to accept offices of truſt, by making them liable to loſſes in the execution of them; and ſecondly, to prevent the frauds of diſhoneſt men in ſuch employments. Therefore at preſent, as far as I can be certain, I will determine, that the conſpiracy called "The Partnerſhip of Five, Four, and Three," are anſwerable in the firſt degree; but as to the others, I ſhall not now determine how far they are anſwerable, but at moſt it will be only in the ſecond degree: and this method I took in a ſimilar caſe that was before me the twenty-eighth of *May* 1739, *The Lead Company v. Hall*, their treaſurer. Their bill was for a ſatisfaction in reſpect of frauds committed by *Hall*, and connived at, or aſſented to, or acted under by the directors; and I held *Hall* to be firſt liable, and if he proved deficient, then the directors. So here I AM OF OPINION, that if it appears any others of the directors, committee-men, or aſſiſtants, are liable, it will be only in the ſecond degree, and upon the deficiency of the partnerſhip.

Therefore I DECREE, that againſt *Adam Sereſbery* and *Jane* his wife, as ſhe is the repreſentative of *Sir Fiſher Tench*, the bill be diſmiſſed, there having been a decree in another ſuit of the ſame

(*a*) But ſee the caſe of Shields *v.* Blackburn, where it is determined, that if *A.* a general merchant, undertake voluntarily, and without reward, to enter a parcel of goods for *B.* together with a parcel of his own of the ſame ſort, at the cuſtom-houſe, for exportation, but makes the entry under a wrong denomination, whereby both parcels are ſeized; *A.* having taken the ſame care of the goods of *B.* as of his own, not having received any reward, and not being of a profeſſion or employment which neceſſarily implied ſkill in what he had undertaken, is not liable to an action for the loſs occaſioned to *B.* 1. H. Bl. Rep. 158.

matters

THE CHARITABLE CORPORATION *againſt* SIR ROBERT SUTTON AND ABOUT FIFTY OTHERS.

matters; and as againſt *Aynſworth* and ſeveral others it be diſmiſſed with coſts; and as between the plaintiffs and other defendants, declare, that the principal queſtion is, Whether the defendants, who are committee-men and aſſiſtants, and their repreſentatives, or any and which of them, are liable on the head of breach of truſt or negligence to make good the loſſes ſuſtained by the Corporation? And it being ſworn by *Thompſon*, that there was ſuch partnerſhip as before ſtated, in fraud of the Corporation, I declare my opinion, that in caſe that fact be true, the parties thereto are originally, and in the firſt place, anſwerable; and if I ſhould determine that any other of the defendants are reſponſible, it will be only in the ſecond degree, in default of the others. Therefore I refer to THE MASTER to examine into and ſtate the nature of the ſaid partnerſhip, with the time when, and for how long, they were ſubſiſting, and all material circumſtances relative thereto.

I DECLARE, that ſuch of the committee-men and aſſiſtants as ſigned notes to *Thompſon* are reſponſible, and the loſs is to be made good by them: that ſuch alſo as ſigned notes without purſuing the rules and directions of the charter and by-laws are reſponſible, and the loſs is to be made good by them. And let THE MASTER enquire into and certify theſe matters, and alſo who did ſign the ſaid notes; and take an account of the loſſes ſuſtained thereby, and alſo of loſſes ariſing from renewing pledges or fictitious pledges: and by whom the notes for thoſe were ſigned; and whether this appeared or was known to the committee, or which of them: and let him enquire into and certify the value of the pledges, and what damage the Corporation have ſuſtained: and let the committee-men and aſſiſtants, and all neceſſary parties, be examined upon both, and produce books and papers as the Maſter ſhall direct: and let a proper repreſentative of *William Aiſlabie*, late a committee-man, be brought before the Court: and as to all parties, except as to thoſe againſt whom the bill is diſmiſſed, let coſts be reſerved.

Ex parte Phelps, a Lunatic (*a*). Caſe 127.

Lincoln's-Inn-Hall, Seals after Trinity Term, 15. & 16. *Geo.* 2. 1742.

THE LUNATIC'S FATHER deviſed to him an eſtate in fee-ſimple, and a leaſehold eſtate, and appointed a truſtee for the care of the lunatic, who renewed the leaſe for the benefit of himſelf, and not of the lunatic; and he was afterwards appointed committee of his eſtate by the Court.

If the truſtee of a lunatic renew a leaſe for his own benefit, it is a breach of the truſt.

HARDWICKE, *Lord Chancellor*, declared, that if theſe facts were ſo, which he referred to THE MASTER to enquire, this was ſuch a breach of truſt, though before he was appointed committee, that he ought to be diſcharged, and another appointed.

(*a*) This caſe from MR. PURCAS.

Caſe 128. Stanhope *againſt* Cope and Others, Executors of Spinks (*a*).

Lincoln's-Inn-Hall, December 14, 1742.

In what caſes a court of equity will decree the redemption of an annuity.

S. C. 2. Atk. 231.

SIR WILLIAM STANHOPE, a young gentleman of a very great eſtate for life, having run conſiderably in debt by gaming and other extravagance, in *June* 1727 borrowed of one *Spinks* eight hundred pounds, and granted him for this money an annuity of one hundred pounds a-year for the life of *Sir William*; in which grant there was a proviſo, that *Sir William*, at any time within three years, might redeem this annuity, on the payment of the arrears that ſhould be due, and fifty pounds more, and giving him half-a-year's notice; and there was alſo a covenant, that *Sir William* ſhould ſell *Spinks* two annuities more of the ſame ſort on the ſame conditions, one on the thirteenth of *September*, and another on the thirteenth of *December* following. On the twelfth of *September* he granted *Spinks* a joint annuity of three hundred pounds, on the cancelling and delivering up the former covenant and grant, and on paying *Sir William* one thouſand pounds more; and on the thirteenth of *December* 1727, this was changed into an annuity for the life of *Sir William* on the payment of four hundred and fifty pounds more; ſo that the whole ſum borrowed was two thouſand two hundred and fifty pounds; and in the laſt grant there was a clauſe, that *Sir William* might redeem this annuity within three years, on the payment of the principal, and the arrears of the annuity, and one hundred and fifty pounds more. The plaintiff paid this annuity till 1736 without complaint; and then he offered to redeem it; which *Spinks* refuſed; but there was no legal tender of the money; and *Sir William* brought this bill againſt *Spinks* to be relieved, which was continued and commended againſt the preſent defendants, his executors.

And on the part of the plaintiff it was urged, that if this was not within, it was at leaſt an evaſion, of the ſtatute of Uſury, which the law or equity never allowed of. It was alſo compared to oppreſſive and fraudulent bargains made with young heirs, which, though LORD NORTH ſeemed to be at firſt of another opinion, are now always relieved againſt; and the caſe of *Nott v. Hill* (*b*), *Beake v. Wiſeman* (*c*), *Twiſleton v. Griffith* (*d*), and the *Earl of Arglaſs v. Muſchamp* (*e*), were cited (*f*); and a ſaying of LORD TALBOT's, in the caſe of *Boſanquet v. Daſhwood* (*g*), "that though there is not ſuch fraud as is properly called *cheating*, "yet if any corruption appear, and the bargain is oppreſſive, he "would relieve."

3. Co. 69, 7c. Cro. Jac. 507.

(*a*) This caſe was taken from the manuſcript of MR. GORE.
(*b*) 1. Vern. 167. 2. Vern. 27.
(*c*) 2. Vern. 121.
(*d*) 1. Peer. Wms. 310.
(*e*) 1. Vern. 237.
(*f*) See alſo Cole *v.* Gibbons, 3. Peer. Wms. 290. Cheſterfield *v.* Janſen, 1. Atk. 342. Barnardiſton *v.* Lingood, 2. Atk. 133. Gwynne *v.* Heaton, 1. Brown's Ch. Rep. 1.
(*g*) Caſes Temp. Talbot, 38.

MR.

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MR. MURRAY, *for the plaintiff*, ſaid, he would not now argue whether the plaintiff might redeem or not, for it ſeemed to him a clear point; and what he ſhould offer on the other point would conclude *à fortiori* to that; but the doubt was, whether *Sir William Stanhope* was not entitled to redeem on the payment of principal and intereſt only, and the defendant to account for what he had received; that he would lay it down as a rule, that no ſecurity ſhould ſtand for more than the principal and intereſt, if the perſon giving that ſecurity was in ſuch circumſtances as would compel him to enter into any ſecurity, however unreaſonable, and if thoſe circumſtances were ſo general as to make it a public inconvenience. That it was merely for that reaſon that marriage brokage bonds were void, though the parties married were of equal quality and fortune. So where young gentlemen who have eſtates in expectancy come into ſecurities of this ſort, let the contingency be what it will, this Court relieves againſt it; as in the caſe of *Kerwin v. Milner* (*a*), determined by LORD KING, viz. *Mr. Kerwin*, a very ſickly young gentleman, and going abroad in the army, being entitled to a good fortune, both on the death of his wife's father and his own, one of whom was eighty and the other fifty-nine, borrowed five hundred pounds of *Milner*, and gave a bond of one thouſand pounds on the death of either of the old gentlemen; and though the money was paid on the bond, yet LORD KING relieved againſt it, without obliging *Kerwin* to pay coſts. That this bond was ſet aſide on the general rule, for *Kerwin* was of full age, and ſolicited the bargain himſelf; and that all theſe caſes have gone on rules of public policy, that men may not ſpend their eſtates before they have them; and it is the ſame thing whether they come to them by way of remainder or deſcent. So bonds given to lewd women are ſet aſide, becauſe men in thoſe circumſtances are likely to come into bad terms; and this is, or may be, the caſe of many perſons. For this general reaſon, though there is no mixture of fraud, bonds got by attornies from their clients pending the ſuit only ſtand as a ſecurity for the payment of principal and intereſt; as in the caſe of *Proof v. Hinds* (*b*), where *Proof*, a very poor man, and ſuing for a conſiderable eſtate, gave *Hinds* an abſolute bond of one thouſand pounds; and on interrogatories it appearing the conſideration of the bond was *Hinds'* aſſiſting *Proof* in the carrying on a law-ſuit, LORD TALBOT, and THE LORDS on appeal, were of opinion, the bond ſhould only ſtand ſecurity for what *Hinds* really deſerved, and his trouble was worth. So in the caſe of *Walmſley v. Booth* (*c*), determined on the ſtrength of the former: viz. *Japhet Croke*, under a proſecution for forgery and perjury, not being able to prevail on any one to be bail for him, *Booth*, an attorney of the court, procured him bail, but obliged him firſt to make his will and leave him a legacy of one thouſand pounds, and then to give a bond of the ſame ſum not to revoke it. *Croke* revoked the legacy, and *Booth* ſuing *Walmſley*

2. Vern. 84. Eq. Abr. 313. pl. 15. 14.

Hall *v.* Pin, Shower's Parl. Caſes, 76. Duke of Hamilton *v.* Lord Mohun, 1. Peer. Wms. 118.

(*a*)
(*b*) Caſes Temp. Talb. 112.
(*c*) 2. Atk. 25. 2. Eq. Abr. 697. Bar. Chan. 475.

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his executor, on this bond, *Walmsley* applied to chancery, and on very great consideration was relieved, and the bond decreed to stand only as a security for what *Booth* really deserved. And on this account only, LORD TALBOT relieved against a bond (*a*) by which the obligor bound himself to pay the obligee part of the profits of the office for his interest in procuring him the place, though there appeared no fraud, and the sum to be paid was so small that the obligor made an advantageous bargain. That the present case was plainly within those general rules, for almost in all marriage-settlements the husband is tenant for life; and he believed the estates of most of the great families were now mouldering away under these annuities. That on the part of the plaintiff, the money was borrowed to feed a present extravagance, which perhaps he would have cured himself of had he not got the money, and had time to recollect; and he told the story of a noble *Venetian*, who cured his son of extravagance by only putting him to the trouble of counting the money which he gave him. But that this case did not stand in the general rule alone, but was infected with circumstances of imposition; for *Sir William Stanhope*, when he came to his estate, which was seven thousand pounds a-year, was but nineteen, and before he was twenty-five had reduced himself to such circumstances as to be obliged to borrow on those unreasonable conditions; and it appeared he entirely trusted to and was in the hands of one *Rogers*, *Mr. Spinks'* agent. That the condition of the grant shewed imposition, for there is a covenant to grant two other such annuities; and that though this covenant was only in the first deed, yet it run through and vitiated them all. That the circumstance of redeeming was a corroboration of this remark, for why should the plaintiff have it inserted if he did not apprehend he had a hard bargain? and why should the defendant's testator require a premium for doing it unless he was certain he made a good one? That it appeared to be *Mr. Spinks'* business to deal in and ruin young gentlemen by these annuities; for that *Rogers*, one of his agents, dealt for him in no less a sum than two thousand pounds a-year. That if it be objected, that the money is all paid on the annuities, the true answer is, that where the money is received in consequence of an usurious or oppressive agreement, the Court cannot give complete relief without ordering an account; and that in the case of *Kerwin v. Milner* the money was all paid.

MR. ATTORNEY-GENERAL *on the other side*. There were four points the plaintiff's Counsel insisted on in order to their relief.

FIRST, That this grant was obtained by imposition.

SECONDLY, That it was in the nature of a mortgage.

(*a*) Law v. Law, Cases Temp. Talb. 140. 3. Peer. Wms. 391. 2. Eq. Abr. 287.

THIRDLY,

THIRDLY, That it was uſurious; and

FOURTHLY, That the plaintiff was at leaſt entitled to redeem on payment of principal and intereſt.

That as to the firſt head, there was no evidence read of any impoſition, or even of *Sir William Stanhope* being in diſtreſs, and that his acquieſcence ſo long was a ſtrong preſumption to the contrary; that though it might be true he employed no other perſon but *Rogers* to tranſact this matter, yet it was proved he applied to *Rogers* firſt; and that it would be very hard to overturn a purchaſe becauſe a perſon did not take proper advice about ſelling his eſtate.

That it was ſaid there was oppreſſion on the face of the deed, becauſe the covenants on the firſt deed were not mutual; for *Sir William* was obliged to ſell, though *Spinks* was not to buy; but the whole deed muſt be taken together, and every part of it as a conſideration for the other part; and that the eight hundred pounds was the reaſon here why the defendant had his option of purchaſing more annuities; as in a leaſe it is common to give the leſſee a liberty of renewing, without the leſſor's reſerving a power to oblige him to renew: but that this deed, being cancelled, was now out of the caſe.

That this was not at all like the caſe of contracts made with, or bonds obtained from, young heirs: that the true reaſon why ſuch contracts were not binding were, firſt, becauſe the party who made them had only a reverſionary intereſt, and becauſe he was at that time probably in diſtreſs; but ſecondly, and chiefly, to preſerve the obedience he owed his father by keeping him dependent on him; which reaſon, as well as the former failed here, *Sir William Stanhope* having no father, having a preſent eſtate, and it is not proved he was in diſtreſs.

Nor does this bear any ſimilitude to marriage brokage bonds; for the true reaſon of laying them aſide is, becauſe the conſideration is a *malum in ſe*, as bonds given to lewd women are void from the *turpis cauſa* which is the conſideration of them.

That the arguments drawn from public convenience could be of no avail here, becauſe they laid down no certain rule where theſe purchaſes are binding, and where not; that it would be very hard to decree, that a tenant for life ſhould not ſell all or any part of his eſtate on any occaſion whatſoever; and that though probably he was in diſtreſs when he made this grant, which was a ſale *pro tanto*, yet it was more reaſonable he ſhould do ſo than to be ſent to gaol; that theſe annuities being uſual and common was the ſtrongeſt argument againſt the plaintiff, becauſe a decree for him would unhinge and diſturb the properties of many perſons whoſe only ſupport theſe annuities were, and who might have purchaſed them fairly, and for valuable conſideration.

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That if it was a miſchief, it ſhould be remedied by act of parliament, which could only affect future grants, and not by a decree, which would be a precedent to overturn and influence former ones.

That though the rule laid down about mortgages, that once a mortgage always a mortgage, was a very true one, yet it had no relation to the preſent caſe, which was a purchaſe; for though the word "redeem" was properly uſed in mortgages, yet it would not conſtitute one contrary to the intention of the parties and the plain meaning of the contract taken all together.

Cro. Jac. 253. Noy, 151. 2. Lev. 7, 8. Cro. Jac. 208.

That this could not be uſury, becauſe the lender run a conſiderable riſque; and by the caſes in the margin, the purchaſing an annuity at an under value is not uſury.

2. Vern. 84. Eq. Abr. 313. pl. 15. a ſtrong caſe that there ſhould be a redemption; and upon payment of principal and intereſt only; and to account for the annuity.

That though the gentlemen inſiſted *Sir William* might redeem on the payment of principal and intereſt, yet they had uſed no argument, nor cited any caſe, to prove he might redeem at all; that this being a purchaſe, the plaintiff had no right to re-purchaſe but by the contract; and that the time in which he was to do it was very material; and then this Court would never relieve if the time was lapſed.

As in the caſe of *Wheeler v. Lord Foley*, determined by LORD HARDWICKE, viz. *Lord Foley* made a leaſe for three lives, in which there was a clauſe, that if any of the *ceſtuy que vies* died within a year, he would renew on the payment of one hundred pounds. Two of the *ceſtuy que vies* died within the year, and after both their deaths the tenant requeſted *Lord Foley* to renew, which he refuſed to do, becauſe the requeſt was not made before the death of the ſecond, who died within a month of the firſt; but on application to chancery he was compelled to renew; though LORD HARDWICKE declared, had the time been lapſed he would have decreed otherwiſe. As in the caſe of *Allen v. Hardiſon*, decreed alſo by LORD HARDWICKE, which was in a covenant in a leaſe of coal-mines, that the leſſor would grant the leſſee a new leaſe on his requeſt within a certain time; the time lapſed, and within a month after the expiration of the term the leſſee applied for a new leaſe, which the leſſor refuſed to grant him; and the Court would not relieve him, becauſe the time was paſſed, though the leſſor permitted the leſſee to continue his poſſeſſion after the leaſe was expired.

He alſo ſaid, that the plaintiff's acquieſcence was a confirmation of it; as in the caſe of *Standard v. Metcalfe*, where *Metcalfe*, being guardian to a young lady who had a good real eſtate, perſuaded her, as ſoon as ever ſhe came of age, to ſettle her eſtate, and put him in remainder. She then made her will, by which ſhe confirmed this ſettlement, and afterward became a lunatic; and on a bill

a bill brought by her committee, the Court refuſed to relieve, becauſe the ſettlement was confirmed by the will.

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HARDWICKE, *Lord Chancellor*, ſaid, he had a great averſion to contracts of this kind, and would always relieve againſt them when it was in his power; that in the preſent caſe, on all he had yet heard (for the Counſel had not all finiſhed), the only doubt with him was, what relief the plaintiff ſhould have, whether he ſhould be allowed to redeem on payment of principal and intereſt from the time of the loan, and an account decreed, or to allow the payment of the annuity till 1736, when *Spinks* refuſed to reconvey, and intereſt from that time, which he ſeemed moſt inclined to do; but that this being the firſt caſe of this nature, and a very doubtful one, he recommended it to the parties to agree, which they did, *viz.* to pay the principal money advanced, and the arrears of the annuity to *Midſummer* 1736, and intereſt from that time to the decree of redemption (*a*).

2. Vern. 84. a ſtrong caſe to that purpoſe. Vide 1. Vern. 476, 477. 483, 394.

NOTE, The Lord Chancellor ſaid, that the plaintiff's evidence was very difficult, as not proving that he was in diſtreſs when the bargain was made; which had he done, it would have altered his way of thinking about the matter.

(*a*) The compromiſe was on the following terms:—The money already paid into court to be applied, in the firſt place, to clear the arrears of the annuity to *Midſummer* 1738, and the ſurplus towards the payment of the 225*l.*; and what it ſhall want of clearing the whole principal advanced to be paid in two months, but no intereſt from 1738 to the preſent time. Reg. Lib. 1741. fo. 86. S. C. 2. Atk. 235.

Stringer *againſt* New.

Caſe 129.

In Chancery, Michaelmas Term, 15. Geo. 2. 1741.

Deſcent.

HARDWICKE, *Lord Chancellor*, delivered the following opinion. THIS CASE comes before me by way of exception taken to the defendant's plea. I was of opinion laſt night, that the plea ſhould be allowed, and I have ſince looked into ſome caſes which have confirmed me in that opinion; and they afford ſtronger reaſons why this plea ſhould be allowed than I laſt thought of; for I had then ſome doubt with myſelf as to the operation of the fine.

THE CASE is thus:

A. being tenant for life, with remainder to truſtees to preſerve, &c. remainder to his firſt and other ſons in tail, remainder to the heirs of his own body, remainder to the right heirs of his father the deviſor, had a ſiſter of the half-blood, who was a daughter of his father by a former *venter*; and he had alſo a ſiſter of the whole blood.

THE QUESTION is, Whether *A.* had made any alteration as to the deſcent of the reverſion in fee? If he had not, it would deſcend to the ſiſter of the half-blood, who was the elder daughter, and equally

STRINGER *againſt* NEW. equally heir to the father with the other daughter. But if he had altered it and given it to himſelf, it would deſcend to the ſiſter of the whole blood, who claims as heir to her brother, who was laſt actually ſeiſed; and therefore ſhe is entitled under that known rule of law, that "*poſſeſſio fratris de feodo ſimplici facit ſororem eſſe "hæredem.*"

But then it is certain, that muſt be an actual poſſeſſion; ſo that it is argued in this caſe, that this being an eſtate for life in *A.* with a remainder in tail and a reverſion in fee expectant, this is not ſuch a poſſeſſion as will intitle the younger daughter to take under a *poſſeſſio fratris.*

What was inſiſted upon on the other hand in order to have altered the courſe of deſcent, and given it to the heirs of *A.* inſtead of the heirs of the father, is, that *A.* had made a leaſe and releaſe, and thereby conveyed the eſtate to *B.* on truſt for the payment of debts, &c. and levied a fine thereof, but had not ſuffered a recovery.

And the queſtion is, Whether this fine has changed the reverſion in fee, and thereby altered the deſcent?

And I AM OF OPINION, that it did alter the reverſion, and that therefore the eſtate will go to the right heirs of *A.*: and I found my opinion on two caſes in *Co. Lit.*; the firſt of which is 15. *a.* where he ſays, "If a man has iſſue a ſon and daughter by one *venter*, and "a ſon by another, and die, and the eldeſt ſon enters and dies "without iſſue, the daughter ſhall have the land by a *poſſeſſio* "*fratris*, and not the younger ſon; but if the elder brother after "his entry endows the wife of his father of a third part, and dies "without iſſue, the younger brother ſhall have the reverſion of the "third part, becauſe the actual ſeiſin which the elder got by his "entry is defeated by the endowment. But if the elder had made "a leaſe for life, and died, and leſſee had endowed the wife, and "tenant in dower had died during the life of the leſſee for life, "the ſiſter, as heir to the elder brother, ſhould have had the whole, "becauſe by the leaſe for life he had altered the reverſion: for in "the firſt caſe, the ſeiſin being defeated as to a third part by the "endowment, the reverſion thereof depended on the eſtate which "the wife was in from the huſband; ſo that in judgment of law a "reverſion only deſcended; but in the other caſe, the reverſion "was changed and altered by the leaſe for life, and is therefore ex-"pectant on a new eſtate for life."

The other caſe is *Co. Lit.* 191. where it is ſaid, "That many "times the change of the freehold makes an alteration and change "of the reverſion; as if tenant in tail or huſband ſeiſed in right of "his wife, or tenant for life, make a leaſe for the life of the "leſſee, in all theſe caſes the leſſor does gain a new reverſion by "wrong." "And if the elder brother grant a reverſion expectant "on a freehold for life, it ſhall cauſe a *poſſeſſio fratris.*" From all

all which caſes it appears, that from any ſuch change in the reverſion it ſhall deſcend to the heir of the ſon, and therefore entitle the younger ſiſter of the whole blood to claim as heir to him by a *poſſeſſio fratris*. STRINGER *againſt* NEW.

In the preſent caſe, the conveyance is by leaſe and releaſe to *B.* to pay debts, &c. : and ſurely this is a great alteration, for this amounts to a grant of his eſtate for life; and it likewiſe paſſes the reverſion in fee; for as he was right heir of his father, he had a reverſion to grant, though it would deſcend to the right heirs of the father without ſuch an alteration; and though the eſtate was ſubject to redemption on payment of the debts, &c. yet it would follow the heirs of the ſon, becauſe the ſon had changed it, and made it his own by a plain alteration.

Now I ſhall conſider what would be the effect of this fine, ſuppoſing the leaſe and releaſe out of the caſe; and that fine would certainly have barred the remainder in tail in himſelf, for he was ſeiſed for life, with remainder to the heirs of his own body; ſo that the fine barred the eſtate, and would have amounted to a grant of the reverſion in fee, if to a ſtranger. Now this reverſion in fee, inſtead of being expectant on the eſtate-tail, as by the deviſe it was, does now depend on an eſtate on contingency.

Therefore on this caſe, whether the reverſion being thus changed ſhall alter the deſcent of it, ſo as to go to the heirs of the ſon, I am clearly of opinion, that it is literally within what was laid down in *Co. Lit.* 191. *b.* that if the elder brother change the freehold, it ſhall alter the reverſion likewiſe, and ſhall cauſe a *poſſeſſio fratris*. In the preſent caſe, I think, that both the conveyances have changed the reverſion, and therefore the eſtate will deſcend to the defendant as heir of the whole blood to the brother, and am therefore well ſatisfied in allowing this plea.

Montgomerie *againſt* The Attorney-General. Caſe 130.

In Chancery, Michaelmas Term, 15. Geo. 2. 1741.

In what caſes the court of chancery will allow letters to be read.

HARDWICKE, *Lord Chancellor*, delivered the following opinion. THE QUESTION is, Whether ſome letters ſhall be allowed to be read? And the caſe by which the queſtion is introduced is this: The plaintiff is heir at law of the teſtator; and the queſtion ariſes upon the ſanity or inſanity of the teſtator at the time of making his will, on which the validity of it depends.

It ſeems, after the death of the teſtator a bill was brought in the name of THE ATTORNEY-GENERAL, at the relation of the deviſees, in order to eſtabliſh the will and to have the truſts executed, in which the heir at law was made defendant. And this Court directed an iſſue at law to be tried of *deviſavit vel non*; which depended on the validity of the will; and a verdict was thereupon given in favour of the will. Whereupon application

was

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was made for *a new trial*; but WILLES, *Chief Juſtice* of the Common Pleas, certified, that he was ſatisfied with the verdict, ſo that the new trial was refuſed; and then this iſſue being tried, a decree was made on the equity reſerved.

The trial of this iſſue was in *Trinity Term* 1738, and the decree made in *Michaelmas Term* following. After which, in the ſame Term, the now plaintiff brought an ejectment in order to recover the premiſes; but on this a new *information* was brought by THE ATTORNEY-GENERAL, in the nature of a *ſupplemental bill*, for a perpetual injunction to ſtay proceedings at law. This came to be heard in 1740, and a decree for a perpetual injunction was accordingly made. Since that, the plaintiff brought a new bill, in the nature of *a bill of review*, and applied to the Court to have the original cauſe heard, and the decree for the perpetual injunction reverſed; and the reaſon he founds this application on is, becauſe ſince the trial and decree he has diſcovered new evidence to ſhew the inſanity of the teſtator, which was not in his power to have produced before, and ſuch as he thinks would have induced the jury to have found a different verdict; and therefore he prays that a decree for a perpetual injunction may be reverſed, ſo that then he may have a new trial. This evidence, it ſeems, conſiſted in letters which were in the cuſtody of the defendants. So that the queſtion now is, Whether theſe letters ſhould be admitted to be read anew proof in this bill in the nature of a bill of review? To the admiſſion of them ſeveral objections have been made: FIRST, That it is not ſhewn that they were firſt diſcovered and came to his knowledge after the firſt decree in *Michaelmas Term* 1738. SECONDLY, Suppoſing they did ſince the firſt decree, yet it is plain it was before the decree for a perpetual injunction; which is ſufficient to induce the Court not to admit the reading of them now, becauſe they might have made uſe of them in order to have prevented that decree being made. Now though this bill is called a bill of review, yet it is only in the nature of a bill of review, and not ſtrictly one, becauſe the decree is not enrolled; yet I muſt conſider it as if it was really one, and therefore muſt reſerve the ſame rules as are laid down concerning bills of review. The original rule that is laid down by LORD BACON (*a*) is, that no decree ſhall be reverſed, altered, or explained, being once under THE GREAT SEAL, but upon bill of review; and no bill of review ſhall be admitted, except it contain either error in law appearing in the body of the decree without further examination into matters of fact, or ſome new matter which hath riſen in time after the decree, and not any new proof which might have been uſed when the decree was made. Nevertheleſs, upon new proof that is come to light after the decree made, and could not poſſibly have been uſed at the time when the decree paſſed, a bill of review may be grounded by the ſpecial licence of the Court, and not otherwiſe. So that on this rule three things are to be conſidered: FIRST,

(*a*) Lord Bacon's Ordinances in Chancery, printed in his Law Tracts, page 279.

Any

Any error in law appearing in the body of the decree. SECONDLY, Some new matter which has riſen in time after the decree; ſo that the ſecond does not take in this caſe as being new matter, &c.; and ſo is the caſe of *Whorehood v. Whorehood* (*a*), where the wife brought her bill for alimony upon her huſband's having left her; and there was a decree, that the huſband ſhould pay her ſo much a quarter. Afterwards the huſband brought a bill to ſtop the allowance, upon a ſuggeſtion, that he had offered to take her home to him, and ſhe had refuſed to come; whereupon the alimony was ſtopped. But this was not properly a bill of review according to the deſcriptions in thoſe rules, but rather in the nature of an original bill. So that in the preſent caſe this is not properly new matter, but it is new proof of that matter which was before alledged, *viz.* of the inſanity of the teſtator, which was originally the defence, and therefore is new proof of that matter, and which could not poſſibly have been uſed at the time of the decree. And I have ſeen a manuſcript of LORD NOTTINGHAM's, with his own notes on *Bacon's Rules*, where he adds of his own, that this new matter muſt be ſuch of which the party could not have advantage at the time of the decree. And agreeable to this rule is 1. *Chan. Rep.* 43. where, after laying down a rule, that nothing is a ground for a new trial after judgment that is not a ground for a bill of review, it is ſaid, "nor is the want of evidence of matters which "might have been uſed in the firſt cauſe, and of which the "party had then knowledge, any ground for a bill of review." Theſe therefore being the rules to be obſerved in bills of review, it is neceſſary now to conſider how far the preſent caſe correſponds with them.

THE FIRST OBJECTION as to allowing this evidence is, that the plaintiff had not ſhewn that theſe letters came to his knowledge ſince the firſt decree. It is admitted by the anſwer of the defendants, that it was after the trial at law; and the plaintiff has ſworn by affidavits, that in *February* 1728 his wife intimated to him, that there were ſome letters wrote by *Chriſtopher Ploy*, a perſon ſent for as an evidence at the trial, to her father before the trial, which ſhe thought might be of ſervice to him. But then this was in *February* 1738, which was both after the trial and decree. But it is objected on the defendant's ſide, that this is no proof, becauſe this affidavit is made by the plaintiff; and ſtrictly ſpeaking it is not: yet notwithſtanding this, it has always been conſidered as ſatisfactory, as far as it concerns the plaintiff's own knowledge; and it is impoſſible for a man to give more certain evidence when a thing came to his knowledge: and to ſhew that it is ſufficient, an affidavit of the ſame nature was allowed in *Hannekra v. Jackſon*, where, though LORD HARCOURT diſmiſſed the bill on this exception, yet the Houſe of Lords reverſed his decree, and held the evidence ſufficient. Beſides, in the preſent caſe this affidavit of the plaintiff's is ſtrengthened by the defendant's anſwer; for they do not ſwear,

(*a*) Eq. Caſes Abr. 67.

nor

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nor indeed ſay ſo much as they believe, that this came to the plaintiff's knowledge before. It is true, this is not an admiſſion, but it is a paſſing over what has been alledged; and all they ſay is, that theſe letters came lately to their knowledge. But theſe affidavits were then filed; and whenever a matter is pointed out on one ſide, and not contradicted on the other, it corroborates what is ſworn; and it often happens on motions, that the facts are imperfectly ſtated; but if the other ſide have an opportunity to clear them up, and do, it ſtrengthens what is ſworn. But ſuppoſe it can be taken in this caſe, that they came to the plaintiff's knowledge between the trial and decree, yet it was after publication paſſed; and then the queſtion is as to the true conſtruction of *Lord Bacon's Rules:* and though to be ſure this does not expreſsly come under his deſcription as being new matter, yet it is new proof of a matter which could not be made uſe of at the time of the decree, it being diſcovered after publication; and LORD NOTTINGHAM ſays, that it muſt be ſuch as could not be taken advantage of at the time of the decree; and ſo is 1. *Chan. Prec.* Now if the proof comes after publication, as the plaintiff is forced to proceed to a hearing, he cannot have any advantage of his new proof at the time of the decree. But it is farther objected, that though this was diſcovered after the trial at law, yet it might have been made uſe of on the motion for a new trial. But that is not now to be conſidered on a bill of review; neither is the Court or the plaintiff bound by that, for new trials are entirely diſcretionary in the Court.

THE NEXT OBJECTION is, that ſuppoſing it does ſufficiently appear to have come to light ſince the making the firſt decree, yet if it appears to have come to knowledge before the ſupplemental bill, that is enough to repel the reading of theſe letters. But as to the ſecond decree, that was merely conſequential while the firſt ſtood in force, for the firſt bill was brought making the heir at law defendant; and the Court decreed a performance of truſts for the charities mentioned in the will. The heir at law afterwards brought an ejectment, but he was not admitted to proceed, for the ſame reaſon as is laid down in *Vernon v. Acherley* (*a*), that a man ſhould not be ſuffered to overturn a decree by a proceeding at law. Therefore I ſay, while the firſt decree ſtood in force, the ſecond decree muſt be made; and though the ſecond decree for a perpetual injunction was made to hinder the plaintiff from proceeding at law, yet it doth not bar him from proceeding in this court, nor can it be pleaded to a bill brought here: and indeed the reaſon of granting a perpetual injunction to ſtay proceedings at law is in order to confine them to this court for relief, and therefore the bringing this bill is not inconſiſtent with that decree. But ſuppoſing, for argument ſake, that the decree for a perpetual injunction would have ſtood in his way had theſe letters come to his knowledge before that was obtained, yet as he has ſworn that his wife, in

(*a*) 2. Bar. Chan. 212. 426.

February

February 1738, intimated, and indeed only intimated, to him, that ſhe believed there might be ſome letters which would be of ſervice to him; and it is further ſworn, that it was *Michaelmas* 1739, and not before, that ſhe told him that ſhe remembered the purport. We are now to conſider, whether theſe letters did not come to the plaintiff's knowledge even after the ſecond decree; for it is not to be imagined that every bare hint of matters in the cuſtody of the adverſe party is to be called coming to a man's knowledge. His wife only told him there were ſome letters before the ſecond decree; but it was ſworn that ſhe told him what the ſubſtance of them was ſince that ſecond decree. Now this evidence muſt be conſidered *ſecundum ſubjectam materiam*; and therefore it is natural to imagine, that the plaintiff might think it dangerous to proceed on this ſort of evidence until he was ſure what might be the effect of it; otherwiſe he might poſſibly oblige the defendant to produce evidence which might be againſt him; and therefore as the words of the rule are, "that the evidence muſt "come to light or knowledge after the decree was made, in order to "have advantage of it by review," I do not think it can be properly ſaid to have come to the plaintiff's knowledge before. But then it has been alledged for the defendant, that this affidavit is ſomewhat ſuſpicious, and that it might poſſibly have come to his knowledge before; and ſo indeed are all thoſe caſes where a man ſwears when a thing came to his knowledge. So is the caſe of *Hannekra v. Jacobſon*, and indeed ſtronger than the preſent; for there a bill was brought on foundation of new evidence which was contained in his own cuſtody in a box in his garret; and the plaintiff annexed an affidavit, that the letters which the box contained were ſent over after the death of the inteſtate, and that they had lain in his garret, and he had not read them before the former decree; and LORD HARCOURT allowed a demurrer to this, and ſo diſmiſſed the bill; but THE HOUSE OF LORDS reverſed this decree, and ordered the Court to proceed on the bill of review; though to be ſure this evidence was liable to many ſuſpicions that it might have come to the party's knowledge before. And that caſe is much more ſuſpicious than this; for there the letters were in the plaintiff's own cuſtody, but here they were in the cuſtody of the adverſe party.

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Hannekra v. Jacobſon.

ANOTHER OBJECTION to the reading of theſe letters is, that it tends to the admiſſion of examination of freſh matters after publication, which the Court ought to avoid. But here is the leſs danger in the preſent caſe, becauſe it is in relation to letters in the defendant's cuſtody; and as this evidence is in writing, there is no danger of perjury. Beſides, there is another very material circumſtance which would induce me to admit of this proof, which is, that on reading over this bill in the nature of a bill of review, I obſerve, that the plaintiff has charged the defendants with fraud; and being ſo, I think it is a ſtrong ingredient in the preſent caſe, becauſe fraud is a ſufficient foundation for a bill of review; and there are ſeveral caſes to that purpoſe, as *Richmond v. Taylor*; and fraud will overturn a judgment at law as well as a decree in this court;

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for if an executor confeſs a judgment, and plead it to an action brought by a creditor, the plaintiff may reply *per fraudem et covinam*, which, if found, is ſufficient to overturn the judgment; and ſo it would the decree here; though I do not ſay that I preſume any fraud in the preſent caſe.

Theſe are my reaſons why I am of opinion, that the letters ought to be admitted to be read; though I muſt ſay, I had a great deal of balancing in my mind, becauſe I would be very cautious how I extend theſe rules as to admitting new evidence further than abſolute neceſſity requires. This determination, however, cannot introduce any general rule as to theſe matters, becauſe it entirely depends on its own particular circumſtance. I AM THEREFORE OF OPINION, that theſe letters ought to be read.

Caſe 131. Sergiſon and Mary his Wife *againſt* Scaley and Others.

In Chancery, Michaelmas Term, 16. Geo. 2.

If a father, previous to his being found a lunatic, make a purchaſe of an eſtate with the conſent and approbation of his only ſon, the purchaſe is good, and the money laid out therein ſhall not be conſidered as perſonal eſtate.

S C. 2. Atk. 412.

MR. PITT being an elderly gentleman, and ſeiſed with a palſy, was ſo far affected as to loſe the uſe of his feet and limbs, and his ſpeech was ſo far injured that he was ſcarce able to pronounce anything more than "*aye*" and "*no*," and at laſt his memory was ſo far impaired that he could only anſwer to very ſhort queſtions; for if the propoſition was of any length he could not retain it. His ſon was entitled to both his real and perſonal eſtate; and in 1724 a commodious purchaſe offering, he made propoſals to his father to buy it, who upon the deſcription of it agreed to it, and rode out along with his ſon and ſteward to view it. Upon which a conveyance was made to the old gentleman; and, the purchaſe-money being a thouſand pounds, he drew an order upon his banker for the payment of it. In 1726 a commiſſion of lunacy iſſued againſt him, and the jurors by the inquiſition found, that old *Mr. Pitt* was a lunatic without lucid intervals at that time, and had been ſo for eight years before, which was ſome years precedent to the purchaſe. The ſon died in the life-time of *Mr. Pitt* his father.

And it now became a queſtion between *Mr. Pitt*'s heir at law and his perſonal repreſentatives, Whether this purchaſe ſhould not be conſidered as perſonal eſtate, it being made by a lunatic?

IT WAS ARGUED *in favour of the perſonal repreſentatives*, that a lunatic not having diſcretion to manage his property, this Court will not ſuffer him to alter the nature of it, ſo as to change real into perſonal, or perſonal into real eſtate *(a)*; and though he be capable of a grant of lands to him by law, yet this Court, notwithſtanding, will conſider ſuch purchaſe as perſonal eſtate in indulgence to his perſonal repreſentatives. That an infant is under the

(*a*) See *Ex parte* Ludlow, 2. Atk. 407. *Ex parte* Annandale, Amb. 80. *Ex parte* Grimſtone, Amb. 706. *Ex parte* Bromfield, 3. Brown. Ch. Rep. 510.

ſame

ſame incapacity; nor will this Court ſuffer the truſtee of an infant to do an act to alter the courſe of ſucceſſion or diſcent, as to lay out money in land, not if the infant have ever ſo much, or the purchaſe be ever ſo commodious. Much more this Court will not ſuffer the money of a lunatic to be inveſted in land, to transfer the ſucceſſion from the executor to the heir; for if the Court were to permit this, it would put it in the power of truſtees to diſpoſe of infants or lunatics eſtates as they pleaſed, as in relation to perſonal and real repreſentatives.

HARDWICKE, *Lord Chancellor*. The general queſtion in this caſe is, Whether here are ſufficient grounds in a court of equity to ſet aſide a purchaſe and conſider land as perſonal eſtate? for taking *Mr. Pitt* to be a lunatic, or *non compos mentis*, which perhaps is a better term, for want of will, he was capable of taking a grant of the real eſtate (*a*) which has deſcended to the plaintiff; and as it is veſted in point of law as real eſtate, the queſtion is, Whether the purchaſe may be ſet aſide in equity, ſo as to be eſteemed a perſonalty? This ariſes upon two points: The firſt, Whether there is ſufficient evidence to induce the Court to believe, that at the time of making the purchaſe this gentleman was a lunatic? The ſecond, Whether this Court is to conſider it as perſonal eſtate if he is one?

In relation to the evidence of lunacy, I AM OF OPINION, that there is not ſufficient evidence that he was at that time abſolutely a lunatic; the only thing that has been read to it is the inquiſition which found him to be a lunatic without lucid intervals at the time of iſſuing the commiſſion in 1726, and for eight years before. The jury have gone too far in finding him a lunatic for ſo long back; they might perhaps with reaſon have found him incapable of managing his affairs with that exactneſs as he ought, and he not a lunatic; which I believe to be the caſe; for this aroſe from an indiſpoſition by the palſy; and there have been often perſons ſtruck with an apoplexy which has afterwards turned to a confirmed palſy. At firſt it might but juſt affect the motion of his muſcles, as in this caſe it took away the uſe of his hands and feet, and left him very little power of his tongue; but in courſe of time the patient, by the weight and advance of his diſtemper, may become quite *non compos*, which I believe to be the caſe of *Mr. Pitt*; for it is poſſible he might be a lunatic at the time of the inquiſition, and capable before. The eight years over-reach the time of the purchaſe; but an inquiſition is not concluſive evidence, for it may be denied and traverſed. Nay, it is not concluſive to the point of time in which it is found, much leſs is it to a retroſpect. There have been many inſtances wherein juries have found a man a lunatic for many years before the inquiſition, and notwithſtanding that evidence has been given to another jury upon trials to controvert ſuch former inquiſition, and the jury have found him not to be a lunatic. What confirms

(*a*) See Co. Lit. 2. b. Perkins, ſ. 51.

SERGISON AND MARY HIS WIFE *againſt* SEALY AND OTHERS.

me that this retroſpect of the inquiſition is falſe is, that in 1724, which was but two years before the iſſuing of the commiſſion, this gentleman lived at the head of his family, had the management of his eſtate in his own hands with the aſſiſtance of his ſon, and his ſteward to ſee it, and drew an order upon his banker to pay the purchaſe-money; and it is not reaſonable to think, that the ſon, who is entitled both to his real and perſonal eſtate, would have made all this parade if his father had been a lunatic. As to *Mr. Pitt*'s being capable of anſwering "Aye" and "No," there has been a caſe of very great conſequence not long ago determined, that a man who could do ſo might paſs his eſtate by will. Therefore, as the evidence ſtands, I think him capable of making ſuch a purchaſe; and I ſhall not ſend it to a trial at law.

But I do not rely ſolely on the opinion that *Mr. Pitt* was not *non compos*; for ſuppoſing him to have been *non compos* at the time, yet there would not be ſufficient ground to change this real eſtate into perſonal, becauſe there is great difference between this caſe at the time of the tranſaction and the caſe of a lunatic; for this gentleman lived at the head of his family with his ſon to aſſiſt him, who was entitled to the poſſeſſions of his father both real and perſonal. The act itſelf is a very reaſonable one, and no objection againſt it by the perſons who claim to have it decreed as perſonal eſtate. He was a gentleman of a very large perſonalty, for the jury found him to be worth thirty-ſeven thouſand pounds. He had been a *Spaniſh* merchant in town, and afterwards retired into *Somerſetſhire*.

The caſe of infants is, as has been argued, that their perſonal eſtate ſhall not be converted into real eſtate by their guardians *(a)*; nor will this Court ſuffer it if application be made to it for that purpoſe, unleſs with this reſerve, that it ſhall be conſidered as perſonal eſtate if he die before twenty-one. But that is different from the preſent; for in that the eſtate left by the parent was never in the power or management of the infant himſelf, or of the guardian, and therefore to be ſure neither of them ought to take upon them ſuch change; but here *Mr. Pitt* has had a power over the eſtate for many years; and though afterwards he becomes weak by a palſy, yet the family continues ſtill to go on in the ſame manner, and the old gentleman aſſiſted in his affairs by his ſon and ſteward, and a reaſonable act is done; and if the Court was to overhaul theſe things, ſo as to conſider a real eſtate as perſonal, it would be very miſchievous. Suppoſe *Mr. Pitt* had made leaſes for life, would the Court have ſet them aſide, though a jury afterwards thinks fit to find him a lunatic for many years back, and that improperly too? Compare the preſent caſe with that of lunatics in the care of this Court: there, whereſoever an account is to be taken of a lunatic's eſtate, the order is, to have thoſe perſons

(a) See Tullit v. Tullit, Amb. 370. Inwood v. Twyne, Amb. 417.

to

to attend who are at that time entitled to his real or perſonal eſtate. If the account be taken, and the parties who were then entitled die, the perſons who come next to be entitled, though they were not preſent at the account, ſhall be concluded by it. Nay, further, if a reaſonable purchaſe offered itſelf for a lunatic, and would ſerve to meliorate his fortune, if there has been no objection by the parties entitled, but they have conſented to have the money inveſted in land, this purchaſe will be good, and bind all future perſons who ſhall be intitled to the perſonal eſtate of the lunatic, though they were not themſelves conſenting to ſuch purchaſe; which is the preſent caſe; for the ſon, who was then entitled both to realty and perſonalty, was aſſenting, and the preſent claimants of the perſonal are bound as much in this caſe as the former before mentioned. Therefore there is no ground to vary this purchaſe.

SERGISON AND MARY HIS WIFE *againſt* SEALY AND OTHERS.

Ineſon *againſt* Moulſton, *et contra*; Caſe 132.

OR,

Jenny Vobe's Caſe.

In Chancery, Michaelmas Term, 16. Geo. 2.

In what caſes a court of equity will oblige the aſſignees of a huſband to make proviſion for his wife.

MR. BURR having four children, by will deviſed all his real and perſonal eſtate to truſtees, and willed them to convert it into money, in truſt that it ſhould be divided equally among his children, any of whom dying under twenty-one, ſuch ſhare was to go to the ſurvivors. *Mr. Vobe* intermarried with the teſtator's daughter *Jenny Burr*, who was then an infant of about eighteen. The marriage was without the conſent of the truſtees. The truſtees had inveſted her fortune in their own names in *Bank* and *South Sea* ſtock to the amount of five hundred pounds. The truſtees alſo lent *Mr. Vobe* ſixty pounds to pay off ſome debt; *Mr. Vobe*, for ſecurity, gave bond; and afterwards aſſigned over to *Mr. Moulſton* all the ſhare of the fortune his wife was entitled to under the will of her father, and this while the wife was ſtill an infant.

And to a demand of a creditor upon theſe ſtocks, *Mrs. Vobe* inſiſts upon the equity of this Court to give her a proviſion.

MR. CHUTE, for *Mr. Moulſton* the creditor, argued, that this Court in general takes care of *femes-covert*, but that ſuch care is only diſcretionary in the Court, and like a party coming here for the ſpecific performance of articles, which the Court, upon circumſtances, may either grant or refuſe; that it is not like the caſe of a bill for redemption within time, for that is neceſſarily decreed, and *ex debito juſtitiæ*; that if the huſband came into this court himſelf for his wife's fortune, the Court will not decree it him without a proviſion for the wife out of it, or ſome other fund of the huſband's; but where a faith is grounded upon a wife's fortune,

Inrson *againſt* Moulston, *et contra*; or, Jenny Vobe's Caſe.

and a perſon truſts the huſband upon the credit of it, it is otherwiſe, and ſhe ſhall not be entitled to a proviſion againſt him.

In the caſe for terms of years, the huſband may by law diſpoſe of them without the joining of the wife; and this Court will never interpoſe to prevent the operation of law, which in many caſes has ſtripped the wife of a proviſion. This Court has even gone farther, and has made the like direction of a truſt-term to the ſole and ſeparate uſe of the wife granted by a former huſband, which a ſecond huſband may diſpoſe of without joining the truſtees; as in the caſe of *Sir Edward Turner* (*a*), in the Houſe of Peers. And the firſt caſe to that purpoſe is *Tudor v. Samyne* (*b*), where it is decreed, that the huſband might ſell ſuch truſt of a term; and though it was objected, that the huſband in that caſe had made no proviſion or ſettlement for the wife, and if he himſelf was plaintiff the Court would not decree the truſtees to aſſign to him without making ſome ſettlement on the wife, and the plaintiff, who is a purchaſor of the truſt-term and deviſes under the huſband, ought to be in no better a condition, *ſed non allocatur*; which ſeems to point out a diſtinction as to giving a proviſion to the wife as between the huſband and her, and not where there is a third perſon as a creditor or purchaſor; that in the preſent caſe the law operates with *Mr. Moulſton*; and though the wife has an equity to have a proviſion, yet *Mr. Moulſton* is a pecuniary creditor, and has an equity to have his debt paid, which ought to turn the balance, eſpecially as he has the common law on his ſide as well as equity.

1. Peer. Wms. 249, 250, &c. Miles *v.* Williams.

That as the huſband, by the very act of marriage, becomes liable, in both his liberty and property, to the debts of his wife, contracted by her *dum ſola*, it would be extremely hard if he ſhould not have the ſame privilege of paying his own debts by her money; for the law makes the huſband an abſolute preſent of all the wife's perſonalty, even of *choſes in action*, at leaſt a right of recovery and of turning them into poſſeſſion, whereby they become his own abſolutely. A huſband has a right to aſſign over a mortgage which the wife has in fee, and yet by law he cannot transfer the fee, though he can in equity: this point your Lordſhip determined in the caſe of *Yates v. Dandy*, 16 *July* 1741, where the wife of *Dandy*, in repreſentation to her brother, was entitled to a mortgage in fee; and the huſband by note acknowledging, that he had borrowed ſo much money of the plaintiff, promiſed to transfer the mortgage: after that he did ſo; and upon *Mr. Dandy*'s death, it became a queſtion between the aſſignee and the widow, Whether ſhe ſhould be entitled againſt him? He inſiſted, it was quite unprovided for; and yet it was decreed, that the huſband had power to transfer the mortgage, though by law he could not the fee: and in this caſe it was remarkable, that the mortgage was more than ſufficient to pay the debt; and though the wife had not relief for proviſion againſt the aſſignee, yet ſhe had out of the ſurplus againſt the repreſentative. That *Mr. Moulſton* had ſupplied *Mr. Vobe* the huſband with

Yates *v.* Dandy, 16th July, 1741, in chancery.

(*a*) 1. Vern. 7. (*b*) 2. Vern. 270.

wines,

wines, by which he has maintained the whole family, *Jenny Vobe* the wife included; and therefore it would be unequitable that ſhe ſhould have the whole fortune.

MR. ATTORNEY-GENERAL *to the contrary.* The queſtion is, Whether or no the defendant *Moulſton* has a right to come into a court of equity to have three hundred and fifty pounds *Bank* ſtock and one hundred pounds *South-Sea* ſtock which belonged to *Jenny Vobe*, wife of *Mr. Vobe?* There are two things proper to be mentioned as the ground upon which we go.

FIRST, The general rule of equity, that whereſoever the huſband comes into a court of equity in order to have his wife's fortune, if he has made no proviſion the Court will take care that he ſhall do it, either collaterally or out of his wife's eſtate; and it is the moſt common caſe, if there is ſuch demand by the huſband, that an enquiry is ordered to ſee what proviſion the huſband has made. There is a difference, it has been ſaid, as to this Court decreeing a proviſion for a wife, between truſt-money, where the huſband or creditors can only come into this court, and money in the hands of an executor or adminiſtrator which belongs to the wife, where the huſband can come into the ſpiritual court for it; that in this latter caſe the Court will not intermeddle to enjoin the ſpiritual court. But that is a miſtake; for as this Court has a joint juriſdiction with that as to wills of perſonal eſtate, it will take up the claim of the wife, and will not let the huſband have a legacy there until there is a proviſion made for her; and injunctions have been granted to that court for that reaſon. Which THE CHANCELLOR agreed had been ſo determined.

SECONDLY, This right that a wife has to a proviſion out of her own fortune runs along with her fortune into all hands, and is clothed with this equity when in the hands of a creditor to her huſband. And this is but natural juſtice; for it is not reaſonable it ſhould be in the power of the huſband to defeat the wife of this incidental right, for ſhe has not barely a *jus ad rem*, but *in the thing* itſelf; and ſurely the reaſon of the Court's interpoſing at all is, the fear it has left the wife ſhould want a maintenance. That as the wife has this right of proviſion in her fortune, a creditor or aſſignee from the huſband ſhall take the fortune equally ſubject to that charge, and ſhall be in no better condition than the huſband. And as in the caſe of *Benſon v. Turton* (*a*), where there was a clandeſtine agreement by *Mr. Turton* with the young lady's father to return one thouſand pounds, part of her fortune, in ſeven years time, without intereſt, and a bond was given for that purpoſe, the whole fortune was put down in the writings, and this bond was given unknown to *Mr. Turton*'s mother, who had made a ſettlement upon the young couple upon conſideration of the entire fortune. *Mr. Turton* brought his bill to be relieved againſt this bond, which

(*a*) 1. Peer. Wms. 496.

Inson *againſt* Moulston, *et contra*; or, Jenny Vobe's Case.

the young lady's father had aſſigned in truſt for his creditors; and it was decreed, that the creditors could be in no better condition than the young lady's father, and that relief would run upon it into whatſoever hands it came.

He then argued, that if *Mr. Moulſton* was to have the benefit of this aſſignment, it would chalk a way to the huſband always to deprive the wife of her proviſion; and if ſhe denied to aſſign it voluntarily, he might get a perſon to buy it at an under-price, which would be a valuable conſideration. There is no injuſtice in this caſe to *Mr. Moulſton*, for he cannot take this without notice of the wife's right, and he muſt purchaſe at his peril.

Watſon *v.* Maſker, at the Rolls, 1732.

He then cited the caſe of *Watſon v. Maſker*, at *the Rolls*, *March* 19, 1732, which was a bill by aſſignees under a commiſſion of bankruptcy againſt *John Maſker*, againſt the adminiſtrator of *Samuel Wiſe*, for his perſonal eſtate. *Maſker*, the bankrupt's wife, being *Wiſe*'s ſiſter, and intitled to it, inſiſted, that as ſhe was unprovided for, the aſſignees ſtood in the place of her huſband, and ought to give her a proviſion; and THE MASTER OF THE ROLLS was of opinion, that ſhe was entitled to it againſt the aſſignees; and conſidering her huſband was a bankrupt, and incapable of maintaining her, he decreed her the intereſt of ſuch perſonal eſtate for life, and then he ordered it to be for the uſe of the aſſignees: he then aſked if there were children; and as they had been married fifteen years, and had had no children, and there was no probability of any, he refuſed providing for them; though he ſaid ſuch proviſions were uſual.

He then cited the caſe of *Jacobſon v. Williams* (*a*) and *Richmond v. Taylor* (*b*).

MR. CHUTE, in oppoſition to theſe two caſes, cited the caſe of *Boſvil v. Brander* (*c*).

THE CHANCELLOR ſaid, he would look into the Books, and fixed *Wedneſday* the third of *November* 1742 for giving his opinion.

HARDWICKE, *Lord Chancellor*. Theſe are croſs-cauſes, and both take their riſe originally in the will of *Joſeph Burr*, who at the time of making it had five children; and by it he gives ſeveral legacies, and afterwards diſpoſes of the reſidue of his perſonal eſtate, which he gives to his executors in truſt, and directs, that it ſhall be divided among his five children, *viz.* his four ſons and his daughter *Jenny Vobe*, ſhare and ſhare alike; and if any of them ſhould die before twenty-one, and without iſſue, then he directs and appoints ſuch ſhare to be divided among the ſurvivors equally. He then goes on and takes up the conſideration of his real eſtate, which were two houſes that were originally the eſtate of his ſecond wife, but by marriage-articles covenanted to be conveyed to him in fee;

(*a*) 1. Peer. Wms. 382.
(*b*) 1. Peer. Wms. 738.
(*c*) 1. Peer. Wms. 458.

but

but which never were conveyed. However, he deviſes the truſt of them, and directs. that ſhe ſhould convey to his executors, and that they ſhould ſell and turn them into money, to be diſtributed in like manner as the perſonal eſtate.

Theſe are the directions of *Mr. Burr*, who died and left five children, his daughter *Jenny*, whoſe ſhare is at preſent in queſtion, being under age at the time of *Mr. Burr*'s death; but whether any of the other were or are ſtill ſo does not appear. One of the brothers died after his father, under twenty-one, and by his death his ſhare ſurvived and went over to the other four children, of which *Jenny* was one. After this, upon the twentieth of *Auguſt* 1739, the defendant *Vobe* married *Jenny Burr*, the daughter, without making her any proviſion or ſettlement, and then contracted debts with ſeveral perſons, but eſpecially a large one with *Mr. Moulſton*, the plaintiff in the croſs-cauſe, for wines in the way of his trade; and on the twenty-third of *March* 1739, he entered into a bond to *Mr. Moulſton* to pay him his debts; and on the twelfth of *April* 1740, about three weeks after giving the bond, made an aſſignment to him in this manner. He aſſigns to him all the ſhare of *Joſeph Burr* the father and *Harry Burr* the ſon's perſonal eſtate, which he was entitled unto in right of his wife, for and towards the payment of the principal and intereſt of the debt. Upon the thirtieth of *May* 1741, he made another aſſignment to *Maſters* and *Carter*, in truſt for all his creditors, of all his right, title, and intereſt, in and to the fourth part and ſhare of *Burr*'s eſtate, upon truſt for payment of the debts of all his creditors, ſubject, however, to the prior aſſignment. At the time of this tranſaction, *Jenny* was an infant, and attained her age only in 1741, about ſeven months after the laſt aſſignment. The ſurplus of the father's eſtate, as to what appears, remained undivided, I mean as to any ſolemn account between the parties; and there ſeems to be no account to make a diviſion of the eſtate which ſhall be concluſive and binding.

Two bills are brought: The firſt in the name of the executors and truſtees in the will of the father, bringing all proper parties before the Court, and prays, that upon their paying *Jenny Vobe*'s portion to ſuch perſons as the Court ſhall direct, they may be indemnified and releaſed from their truſt,

The croſs-bill is brought by *Mr. Moulſton* the aſſignee, who prays, that the executors may aſſign to him the ſhare of *Jenny Vobe*'s portion for the payment of his debt, and then ſubmits to the Court, whether the ſurplus ſhall go to the huſband and wife, or to the creditors under the ſubſequent aſſignment,

In the ſeveral anſwers, theſe two aſſignments are inſiſted upon: As to the huſband the equity is plain, that *Moulſton* upon the firſt, and all the creditors upon the ſecond aſſignment, as againſt him, ſhall have the fortune, ſubject to the payment of their reſpective debts; but the queſtion ariſes in regard to the defendant the wife, for whom it is urged,

FIRST,

INESON *againſt* MOULSTON, *et contra* CR, JENNY VOBE'S CASE.

FIRST, That by the conſent and equity of this Court, if a huſband having married a woman an infant without making proviſion for her, or if ſhe be not an infant and ſhe do not conſent, and he come into this court for her fortune, it will not be decreed him till he has made a proviſion for her.

SECONDLY, That this right of proviſion is an equity which is attached or annexed to the thing or eſtate itſelf, therefore the aſſignee takes it ſubject to the ſame equity; and that he ſhall not have the aid of this Court to have the aſſignment applied to the payment of his debts, though for valuable conſideration, without firſt making a proviſion for the wife in the ſame manner as the huſband would have been obliged to do.

As to THE FIRST QUESTION, which relates to the huſband, the equity is extremely plain; and it is an equity grounded upon natural juſtice, and that parental care which this Court exerciſes for the benefit of young infants who are orphans, deprived of the advice of their parents, and often drawn into improvident matches; for which reaſon this Court ſeats itſelf *in loco parentis*, and ſettles a proviſion for the wife out of her fortune, upon a preſumption, that her parent would not beſtow her fortune upon a huſband without a proviſion for his child. Therefore if the huſband be forced to ſue for his wife's fortune in this court, or in any other court with which this has a concurrent juriſdiction in that demand, the huſband ſhall make a proviſion for his wife before he ſhall attain to her fortune. And upon this it is, where a portion has been left by way of legacy, as it is here, and the huſband has paſſed by this court and gone into the ſpiritual court, which he may do, this Court has enjoined the huſband from proceeding there, and compelled him to come into this court, or reſtrained him there until he had made reaſonable proviſion. But ſuch injunctions go only to ſuch courts with which this has a concurrent conuſance. And this has been apprehended to have been a newer and more recent exerciſe of juriſdiction of this court than it really is; for if you look into *Tothil's Records*, *or*, *Tranſactions in Chancery*, 1695, he mentions the caſe of *Tanfield v. Davenport (a)*, where a perſon ſuing in the ſpiritual court for a portion due to his wife, this Court enjoined him until a proviſion was made for her. This was ſo long ago as the fourteenth year of *Charles the Firſt*, in LORD COVENTRY'S time; which ſhews this to be a more antient exerciſe of the juriſdiction of this court in this reſpect than is imagined.

Though this be ſo, yet if the huſband can come at a particular chattel debt or duty of the wife without the aid of this court, or any other having concurrent juriſdiction with this, I do not know where it has interpoſed, even againſt the huſband himſelf. Therefore if there has been a debt, or part of her fortune, whether equitable or legal, if the debtor would pay it, I do not know where the Court would hinder him, or upon an original bill by the wife would

(*a*) Tothil, 179.

decree

decree him to make a proviſion for her. So where there has been a bond-debt due to a woman *dum ſola*, and an after-taken huſband has ſued the debtor at law, I do not know a caſe where the Court has granted an injunction to ſtay proceedings until he had made her a proviſion, for there this court has no juriſdiction; and he could not come into it for debt, it being only ſuable for in law. But I will not ſay, that if the bond-debt was the only fortune of the wife, what this Court would do; but there is no caſe where it has gone ſo far.

INGSON *againſt* MOULSTON, *et contra*; OR, JENNY VOBE'S CASE.

As to THE NEXT POINT, that this is an equity which is attached or annexed to the thing or eſtate itſelf, and therefore the aſſignee takes it ſubject to the ſame equity, and that he ſhall not have the aid of this Court to have the aſſignment applied to the payment of his debts, though for valuable conſideration, without firſt making a proviſion for the wife in the ſame manner as the huſband would have been obliged to do,

Upon this ſecond queſtion the doubt has ariſen. In the caſes upon this ſubject there appears ſome variety of determination; and it is not eaſy to reconcile the differences. This is clear, that if the huſband make any voluntary aſſignment or conveyance of the portion of the wife, ſhe will have the ſame equity againſt ſuch voluntary aſſignee as againſt the huſband himſelf: and this is the caſe of *Burnet v. Kynaſton* (*a*), which was, where a wife was entitled to a mortgage in fee, and the huſband aſſigned his intereſt in the mortgage to truſtees to call in the money and inveſt it in land to be ſettled to the uſe of the huſband and wife and their iſſue, remainder to the right heirs of the huſband; the huſband and wife died without iſſue, and a repreſentative of the huſband claimed the benefit of the mortgage by virtue of the aſſignment; but the Court diſmiſſed the bill, becauſe the huſband had not an abſolute power over the mortgage, but being in the nature of a *choſe in action* he had only a right to reduce it into poſſeſſion; and not having ſo done in his life-time, his aſſignee ſtood but in the place of the huſband, and could not have a greater right or power than the huſband himſelf had, which was only to reduce it into poſſeſſion in his life-time; and not having ſo done, it muſt ſurvive to the wife, notwithſtanding the aſſignment, and muſt go to her adminiſtrator. There would be the like equity againſt the executor or adminiſtrator of the huſband as againſt a voluntary aſſignee; and alſo the ſame equity againſt any perſon who ſtands in the place of the huſband; and that is the caſe of aſſignees under a commiſſion of bankruptcy, that where they take benefit of a wife's fortune under a general aſſignment of the commiſſioners, they ſhall be bound by this equity or right of proviſion in the wife; and if they come into this court, they muſt allow a proviſion for the wife, becauſe they take only juſt the ſame eſtate and intereſt as the huſband did, and the act of parliament throws it upon them without conſideration. This has been ſo determined in

(*a*) 2. Vern. 401.

the

INTSON *against* MOULSTON, *et contra* CR, JENNY VOLE'S CASE.

FIRST, That by the consent and equi[ty] case deserves to be husband having married a woman an in[fant] ular in it; and is thus: vision for her, or if she be not an in[fant] niece, *Elizabeth Taylor*, and he come into this court for h[im] after the death of the testator's him till he has made a provisio[n] twenty years, if she should so

SECONDLY, That this [case] being at that time much in debt by attached or annexed to th[e] having gained the young gentlewo- takes it subject to the [debts] her maid-servant. The niece was about aid of this Court to [her] marriage, *J. S.* became a bankrupt, and his debts, though [not] ned over all the estate and effects of the provision for [the] s in trust for the creditors, who brought have been ob[tained] cy, the testator's widow being dead, and the

As to [the] twenty years old, and consequently the legacy band, [the] nkrupt had two children by his wife then living. upon [the] coming on before BARON PRICE in the absence of exc[hequer] CELLOR, THE BARON, in regard to the creditors, of [the] legacy and interest to be paid to the plaintiffs. [An] appeal from that decree to THE CHANCELLOR, his [lord]ship declared, that forasmuch as the plaintiffs, the assignees in the commission, claimed under the bankrupt, they ought not to be in a better case than the bankrupt himself; and since, if he had brought a bill for that legacy, the Court would not have allowed it him without obliging him at the same time to make some provision for the wife and children, so, for the same reason, when these claiming under the bankrupt (and who must be exactly in the same case as he himself would have been in) come for equity, they ought to do equity, which would be to provide for the wife and children of the bankrupt, from whom they derived their claim; but with regard to the interest of the money, as the bankrupt was commonly allowed to receive that, so the assignees ought to receive the same during the bankrupt's life: also if the bankrupt's wife should die without issue, then the bankrupt would have been allowed to have received the whole money, and therefore in such case the assignees should be allowed to receive it also. MR. VERNON, in this cause, cited the case of *Taylor v. Wheeler* (*b*) to shew, that assignees under a commission of bankruptcy are not to be considered as purchasors; and to be sure it was a very good case for that purpose, and was thus: *A.* mortgaged a copyhold for a considerable sum, but the conveyance was defective for want of a surrender being presented in time. After which *A.* became a bankrupt; and THE COURT helped the mortgagee of the copyhold against the assignees under the commission, which he urged to be an argument that the creditors or assignees of the commissioners are not to be considered as purchasors. Upon another objection in this cause, *viz.* that the assignment was made before any right to the legacy vested in the wife, for by possibility it might never vest, because she might die before twenty, the Court said, it was clear that the commis-

(*a*) 1. Peer. Wms. 382. (*b*) 2. Vern. 564.

sioners

ld not aſſign this poſſibility of right which the bankrupt tion; and conſequently, the aſſignees being plaintiffs in tling themſelves under this aſſignment, which is void ch poſſibility, therefore the bill muſt be diſmiſſed. train in the report of this caſe; and it looks R reſted his opinion upon the aſſignment of the void; but if he founded his decree upon that only, one, and is not law, for commiſſioners of bankruptcy a poſſibility, and it has been ſo determined often; for the the act of parliament are, "all that the bankrupt can de- t with," and a poſſibility may be releaſed or aſſigned in law equity. And though LORD COWPER mentions the point of the poſſibility at laſt, yet there is nothing in the report which ſhews that he was of a different opinion as to the wife's right of proviſion againſt the aſſignees.

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2. Vern. 563. Thomas v. Freeman.

Another caſe cited at the Bar is that of *Watſon v. Maſker*, before SIR JOSEPH JEKYLL, late *Maſter of the Rolls*, in 1732; and that caſe is as it was cited, and is the ſame reſolution as in *Jacobſon v. Williams*, that aſſignees ſtanding in the place of the bankrupt ſhall not have the wife's fortune without making her a proviſion at the ſame time out of it. But though theſe caſes are ſo in relation to the huſband himſelf, and in relation to voluntary aſſignees or aſſignees under a commiſſion of bankruptcy, yet where the huſband has, for a valuable conſideration, aſſigned a particular ſpecific chattel or debt, whether legal or equitable, which the huſband can reduce into poſſeſſion without coming into this court, or thoſe having concurrent juriſdiction with this as to the thing demanded, there the reſolutions have been contrary, that ſuch aſſignees ſhall not be compelled to make proviſion for the wife; and this is the caſe of *Tudor v. Samyne* (*a*), and was thus: *A.* being poſſeſſed of a remainder of a term for thirty-nine years, conveys it to truſtees for the ſeparate uſe and benefit of the defendant his wife, who marries *B.* a ſecond huſband, who firſt mortgages the term, and then aſſigns it to *C.* who brings his bill againſt the wife and her truſtees, to compel them to aſſign over the legal eſtate to the plaintiff; and decreed accordingly; for as the huſband may diſpoſe of a term for years, where the legal eſtate is in the wife, ſo he may of the truſt of a term without either the wife or the truſtees joining; and *Sir Edward Turner's Caſe* was cited, that a term aſſigned by the firſt huſband for the ſeparate uſe of the wife may be ſold or diſpoſed of by the ſecond huſband. It was objected, that the huſband in this caſe had made no ſettlement or proviſion for the wife; and if he was plaintiff, the Court would not decree the truſtees to aſſign without his making ſome ſettlement on the wife; and the plaintiff, who derives under the huſband, ought not to be in any better condition: *Sed non allocatur.* There was a diſpute at the Bar, whether the

Ante, 376. S. C. cited at large.

(*a*) 2. Vern. 207.

non

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non allocatur was to be applied to the aſſignees making a proviſion, or to the huſband's; and I AM OF OPINION, that it is to be applied to the aſſignees not being obliged to make a proviſion, for the huſband in ſuch caſe would: though it was ſaid, the huſband would not, becauſe this juriſdiction of making proviſion for wives has ariſen ſince that caſe; but that is a miſtake, for that doctrine was very well underſtood at that time; and that appears from *Tothil* as above in the reign of *Charles the Firſt*, and that in its full extent; for the caſe he mentions was of an injunction even to the ſpiritual court. So *Walters v. Saunders (a)* is thus: *A.* made a ſettlement, whereby he created a term for years, in truſt to raiſe four hundred pounds a-piece for his two daughters; one of them married *B* and he and his wife brought a bill, and had a decree to have the four hundred pounds raiſed and paid; but before it was raiſed, *B.* aſſigned the benefit of the decree to one *J. S.* in truſt for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided: the creditors brought a bill to have the benefit of the ſaid aſſignment; and though it was inſiſted upon in behalf of the wife, that there was a difference between a term in truſt to raiſe a ſum of money for a woman and a truſt of the term itſelf for a woman, yet THE MASTER OF THE ROLLS held, that this being a term for years, and not a ſum of money, and therefore not to be diſtinguiſhed from *Sir Edward Turner's Caſe*, he muſt decree it, though againſt his conſcience, that there may be an uniformity of judgments. So is the caſe of *Boſvil v. Brander (b)*: A *feme ſole* was a mortgagee in fee for eight hundred pounds, and married a tradeſman, who becoming a bankrupt, a commiſſion of bankruptcy was taken out againſt him, and the commiſſioners aſſigned over all his eſtate, both real and perſonal: afterwards the huſband died; and the writings relating to this mortgage being in the aſſignee's hands, the widow of the bankrupt brought a bill againſt them for theſe writings, and to have the benefit of the mortgage: the cauſe came on to be heard, and for its difficulty was ordered to be ſpoke to again; when His Honour delivered his opinion ſolemnly for the wife; but afterwards being diſſatisfied with that opinion, he ordered the decree to be ſtayed, and to be attended again by Counſel. Whereupon His Honour gave his opinion, that if there had been any articles before the marriage purporting that this mortgage-money ſhould continue in the wife as her proviſion, or ſhould be aſſigned in truſt for her, they would be a ſpecific lien upon the mortgage, and have preſerved it from the bankruptcy. Alſo it might have been a matter of different conſideration if the aſſignees had been plaintiffs in equity, and deſired the aid thereof to ſtrip an unfortunate widow of all ſhe had in the world, towards the doing of which equity would hardly have lent any aſſiſtance, becauſe the aſſignees claiming under the bankrupt huſband could be in no better plight than the huſband would have been; and if the huſband had in equity ſued for the money, or elſe prayed that the

(*a*) Eq. Caſes Abr. 58. (*b*) 1. Peer. Wms. 458.

mortgagor

mortgagor might pay the money to the huſband without his making ſome proviſion for his wife, or at leaſt the wife, by an application to the Court, might have prevented the payment of the money to the huſband, unleſs ſome proviſion were made for her. But in the preſent caſe, the widow is plaintiff againſt the aſſignees, ſo that ſhe, and not the creditors, ſeeks the aid of equity. And there being in the mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *choſe in action* was well aſſigned by the commiſſioners to the aſſignees, and veſted in them; like the caſe of *Miles v. Williams* (*a*), where a bond made to a woman *dum ſola* was adjudged to be liable to a future huſband's bankruptcy, and aſſignable by the commiſſioners. Wherefore if the right to the debt was veſted in the aſſignees, as plainly it was, though the legal eſtate of the inheritance of the lands in marriage continued in the wife, yet this was not material, it being no more than a truſt for the aſſignees: like the common caſe; where there is a mortgage in fee, and the mortgagor dies, here the mortgage-money belonging to the executors, though the heir takes the legal eſtate by diſcent, yet he is but a truſtee for the executor; for the truſt of the mortgage muſt follow the property of the debt, elſe the mortgagor would be in a very hard caſe, liable to be ſued by the aſſignees of the commiſſioners upon the covenant, and alſo in ejectment by the wife of the mortgagee; whereas the latter ſuit would be enjoined by equity. So in the laſt caſe cited, which is that of *Bates v. Dandy* (*b*), before me on the ſixteenth of *July* 1742, which will appear to be a caſe much of the ſame kind with the laſt before SIR JOSEPH JEKYLL; for the two mortgages were two ſpecific things, part of the property of the wife from her brother *John Dyer*, of whoſe perſonal eſtate there had been an account taken, the ſhares divided (for there were ſeveral perſons entitled), and the eſtates parted; and there was a declaration ſigned by the parties, that the total amount of the ſurplus ſhould be carried to the account of ſuch partition, and that the mortgage in fee ſhould remain to *William Dandy* and *Mary* his wife; and the deeds were accordingly delivered over to him; he borrows money of *Bates* the plaintiff, and gives him a note to aſſign the mortgage in fee to him, and depoſited the deeds in his hands as a ſecurity till then, juſt as the aſſignees had the cuſtody of the mortgage in the ſaid caſe of *Boſvil v. Brander* (*c*), before SIR JOSEPH JEKYLL; and I WAS OF OPINION, that the creditor of the huſband had a lien upon the mortgage, and that I could not take it from him until the money was paid; and though I decreed this part againſt the wife, yet as there was a ſurplus after the payment of *Bates*, I decreed that againſt the repreſentatives of the huſband in favour of the wife. In theſe four caſes laſt cited, the particular contracts of the huſband, and the conſiderations upon which the ſame aſſignments have been made, have got the better of the wife's equity of proviſion; and they ſeem to go upon the ſame ground in two of the caſes, VIZ. *Tudor*

(*a*) 1. Peer. Wms. 249.
(*b*) 2. Atk. 207.
(*c*) 1. Peer. Wms. 458. 2. Eq Abr. 113.

v. Samyne

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v. Samyne and *Walker v. Saunders*, as in *Sir Edward Turner's Caſe*, whether rightly applied or not I will not ſay. And the ground in *Sir Edward Turner*'s was, that as the huſband might aſſign a term of his wife's, ſo he might aſſign the truſt of a term, for equity follows the law, and there ought to be the ſame rules of property in equity as at law. The court of chancery at firſt ſhewed great diſſatisfaction at ſuch a determination in THE HOUSE OF LORDS; inſomuch that, in *Pitt v. Hunt* (*a*), the LORD CHANCELLOR NOTTINGHAM, whoſe decree was reverſed in the caſe of *Sir Edward Turner*, ſaid, THE LORDS had altered the law without an act of parliament; but he ſaid, he muſt be concluded by THE LORDS' judgment, for that there muſt not be one ſort of equity above ſtairs in THE HOUSE OF LORDS and another below ſtairs in chancery. But where the huſband has, for valuable conſideration, aſſigned a debt, duty, chattel, or *choſe in action* of the wife's, there this Court has grounded the validity of it upon the authority the law gives the huſband to receive, recover, or get in, ſuch things of his wife's; and where they have been aſſigned ſpecifically for valuable conſideration by the huſband, it will be binding upon the wife.

As to the laſt aſſignment made to the defendants *Maſters* and *Carter*, I AM OF OPINION, that part of the caſe does not differ from that of aſſignees under a commiſſion of bankruptcy; for *Vobe* aſſigns all his goods and chattels generally, and all his right or ſhare of his wife's fortune, and not the thing itſelf; and it is only againſt him, and not againſt the wife.

As to the firſt aſſignment to *Moulſton*, which is in conſideration of a particular debt of ſix hundred and four pounds due from *Vobe* to *Mr. Moulſton*, that is different from the general aſſignment, and differs alſo from all the caſes I have cited; and there are no caſes to come up to it. For firſt, the preſent is the caſe of a mixed fund ariſing from both real and perſonal eſtate; for the father, *Joſeph Burr*, by will has deviſed this real eſtate to truſtees and their heirs, with directions to ſell and turn it into money, and that to be conſidered as perſonal eſtate; but if the debts and legacies of the father had been paid, and all the children had come to age, they, no doubt, might have come againſt the truſtees to have it continued as real eſtate, if it had not been ſold, and they would have had that equity; and in relation to ſuch real eſtate, the wife being an infant, any diſpoſition of it by him would have been void.

SECONDLY, *Mrs. Vobe* was an infant during all this tranſaction, even at the laſt aſſignment, and therefore the peculiar object of the care of this Court. Beſides, the aſſignment was not of a term for years, or of the truſt of a term, or of any ſpecific particular debt, or chattel, or *choſe in action* due to the wife, but it is of the whole fortune; for *Vobe* aſſigns to *Mr. Moulſton* all the ſhare of *Joſeph Burr* the father and *Henry Burr* the ſon's perſonal eſtate which he

(*a*) 1. Vern. 18.

was

was entitled unto in right of his wife, for and towards the payment of the principal and intereſt of *Mr. Moulſton*'s debt; and all this of an aſſignment of ſuch an eſtate or intereſt which the huſband had not, nor could reduce into poſſeſſion without coming into this court, for there had been no partition to bind all the children. The truſtees indeed had, out of their care, paid the children part of their fortunes, and had inveſted four hundred and fifty pounds in ſtocks for *Jenny Vobe*; but this was of their own head; and there could be no account taken to bind the parties, nor could the truſtees joining with the huſband himſelf do it; for the wife was an infant, and if ſhe died before twenty-one there was right of ſurvivorſhip in her brothers to have her ſhare; and if any more of the brothers had died before twenty-one, ſhe would have come in as a partner in their fortunes; ſo that the truſtees, as yet, could not tell what *Jenny Vobe*'s proportion was. Therefore the defendant *Moulſton*, who is plaintiff in the croſs-cauſe, muſt have known, at the time of the aſſignment, that he took an intereſt of the wife's which all the parties joining together could not make ſecure to him without an interpoſition of a court of equity, and therefore muſt take it ſubject to the equity of making a proviſion out of it for the wife.

And in this caſe I lay great ſtreſs upon the aſſignment's being a general one of the wife's whole fortune; and if ſuch aſſignment ſhould prevail againſt the wife, it would defeat all the care and caution of this Court relative to infants; for a man would need only to run away with an infant, and if he could not come at her fortune (if the truſtees ſtood out) without the aid of this Court, to aſſign over her whole fortune for valuable conſideration; and that he might do, though neither he nor the lender might come to the certainty of this, and might only know in the groſs that it was worth the money advanced; and perhaps ſuch huſband might be in debt before his marriage, might be a tradeſman in fear of either arreſts or of a commiſſion of bankruptcy againſt him; and he would not fail in ſuch circumſtances, nay it would be the conſtant caſe for him to aſſign his wife's fortune in this general manner for his creditors, which would leave the widow and children quite deſtitute, and defeat the care of this Court, if ſuch aſſignment were to ſtand.

And this weighs with me, that I ought not to ſuffer ſuch aſſignment to prevail. To this it may be objected, that people will not venture their money upon ſuch aſſignments, where there may be ſome hazards, and where they have not had ſome opportunity of looking into the title and deeds to be aſcertained of the value, and therefore there is no danger of ſuch general aſſignments as the preſent one is. But I fear, if I was once to allow and legitimate theſe proceedings, there would be people enough who would do it; for though they could not tell the abſolute particulars of the fortune, yet they might know it to be ſufficient to pay them.

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THEREFORE I AM OF OPINION, in the preſent caſe, that I ought not to make a decree in the croſs-cauſe in favour of the creditor, *Mr. Moulſton*, or the creditor under the ſubſequent aſſignment.

As to the decree, what LORD COWPER ſays in the caſe of *Jacobſon v. Williams* is material. He ſays, "as to the intereſt, as "the huſband was allowed to receive it, the aſſignees ſhould receive "it during his life; and if the wife died without iſſue, the aſſignees "ſhould have the whole." If this is the rule, *Mr. Moulſton* will be entitled to receive all the intereſt for the life of *Mr. Vobe* the huſband; the conſequence of which will be, that as *Mr. Vobe* is a failing man, his wife and children will be ſtarved, and *Mr. Moulſton* have no great benefit, for he will receive yearly but barely the intereſt of his debt. Therefore I think the beſt way will be, if *Mr. Moulſton* will come into terms, to give the wife and children a proportion of the money, and he to have the reſt himſelf. This way, all will have a benefit; the wife will have an immediate proviſion, and the creditor will have a groſs reſidue.

MR. ATTORNEY-GENERAL then ſaid, that in the caſe of *Richmond v. Taylor* (*a*), the whole money was ordered to be put out at intereſt for the benefit of the wife.

But HARDWICKE, *Lord Chancellor*, ſaid, he had read that caſe, and that he would not have done ſo; and ſuppoſing the wife and children had come againſt the huſband himſelf, he would have only made a proviſion for her and the children after the death of her huſband.

MR. ATTORNEY-GENERAL replied, that in the caſe of bankrupts or failing huſbands it was otherwiſe; for there the proviſion was to be made immediately, becauſe of the inability of the huſband to maintain them; and that was the caſe here.

But HIS LORDSHIP ſaid, the firſt propoſal would be loſt; and accordingly ordered it to ſtand over till the firſt day of cauſes after the firſt Seal after Term, when *Moulſton* and the wife agreed to divide the ſtocks equally between them; and the wife's ſhare was agreed to be placed out at intereſt in the accountant-general's name, and ſhe to have the intereſt to her ſeparate uſe during her life; and after her death, the principal to be divided equally among her children; and if none, the money to be paid as ſhe ſhould appoint.

(*a*) 1. Peer. Wms. 734. 2. Eq. Abr. 516.

Steward

Steward and his Wife *againſt* The Eaſt-India Company. Caſe 133.

SIR EDWARD COWEN being ſettled at *Bombay*, in the *Eaſt-Indies*, and having raiſed a large fortune to the value of ſixty-eight thouſand pounds, in order to return it to *England* obtained a bill from the governor and council of *Bombay* upon the *Eaſt-India Company* here for fifty thouſand pounds. Thirty-five thouſand pounds, part of the fifty thouſand pounds, they paid him without ſcruple; but as fifteen thouſand pounds, the remaining part of it, was not paid in caſh, but conſiſted of two bills drawn by *Sir Edward* upon *Mr. Lowther*, his agent at *Surat*, for ſixty thouſand rupees each, they refuſed to pay that until an account came from *Surat* that the two bills had received proper honour by *Mr. Lowther*; which arriving, *the Company* paid it with intereſt from the time it was due. *Sir Edward*, after this, wanted to remit eighteen thouſand pounds more, and paid the money to the governor and council at *Bombay*, and had bills for that ſum on the *Eaſt-India Company*, who refuſed payment, becauſe they ſaid the fifteen thouſand pounds was not paid by *Mr. Lowther*.

In what caſes the court of chancery will or will not permit the books of the *Eaſt-India Company* to be inſpected.

S. C. 1. Eq. Ab. 40. 73. S. C. 2. Vern. 380.

A bill was then brought by the repreſentatives of *Sir Edward Cowen* againſt the *Eaſt-India Company* for this ſum of eighteen thouſand pounds.

And upon motion it was prayed, that the plaintiff might be at liberty to inſpect the books and papers at *Surat* and *Bombay* in relation to the tranſaction of two bills drawn on *Lowther*, and that the factor might produce them upon oath.

HARDWICKE, *Lord Chancellor*. This caſe is different from that of a ſtockholder of the Company, who is a member of it, and has a right to inſpect ſuch books wherein his ſtock is contained as much as a copyholder has to examine the rolls of the manor which relate to his own title. The modern way has been to ſhorten anſwers more than formerly. The antient method was, that where the anſwer was deficient, the plaintiff continued excepting till a full anſwer was put in; or if the bill was inſufficient to produce a ſatisfactory anſwer, the plaintiff amended it; but at this day, where the defendant does not ſet forth deeds and writings fully, the Court gives the plaintiff a liberty, upon motion, of inſpecting them, and of having them delivered to him by the defendant for that purpoſe upon oath, and alſo to take copies of them.

The motion here is, that as the *Eaſt-India Company* have put in an anſwer that the entries and writings ſpecified in their anſwer are all which relate to the tranſaction of the fifteen thouſand pounds, as they are informed by their factors at *Bombay* and *Surat*, that that is not ſatisfaction enough to the plaintiff, as Companies do not put in their anſwers upon oath, nor do the factors ſwear that theſe are all the entries. The plaintiffs, therefore, move to have theſe books and entries inſpected, and the factors to be examined touching

STEWARD AND HIS WIFE *againſt* THE EAST-INDIA COMPANY.

them upon oath. But this is a motion I cannot comply with, for many reaſons. This tranſaction is firſt in the years 1735 and 1736, and the conſultation of the books of the Company in their factories abroad, or duplicates thereof as tranſmitted into *England* every year, or at leaſt as often as ſhips come; therefore the motion ſhould have been to inſpect thoſe entries here. SECONDLY, Such an order of inſpection would introduce great inconveniencies, for the conſultation-books in the factories abroad contain matters of government and public regulation as well as thoſe things which relate to private trade; and if the plaintiff was to have a general licence to inſpect, he would ſee entries of other natures than his own, which would be very miſchievous to *the Company*; and as you have not named particularly in your notice what particular entries or papers are to be examined, I can make no certain order about it. Beſides, THIRDLY, though you have not the anſwer of the Company upon oath, yet it has been uſual in many caſes, as the *caſe of the York Buildings Company*, *the caſe of the Charitable Corporation*, *the caſe of the South-Sea Company*, *&c.* to make ſeveral of the members of ſuch ſocieties defendants to the bill in their natural or perſonal capacity, in order to have the ſatisfaction of their anſwer upon oath; and if you have not particularly enough named your writings which you want, you may amend your bill, and make the factors defendants; or if the Company has not anſwered ſufficiently, you may except until they do.

Caſe 134. Montgomery *againſt* The Attorney-General.

In Chancery, Michaelmas Term, 16. Geo. 2.

The court of chancery will not grant a new trial after two trials at bar, although the verdicts were contrary to each other, unleſs ſuch new trial appears neceſſary to the juſtice of the caſe, from *new evidence* which could not be had on the former trials.

S. C. 2. Atk. 378.

IN THIS CAUSE there had been one TRIAL AT BAR and verdict in the common pleas in favour of the will, and a ſubſequent TRIAL AT BAR and verdict before the court of king's bench againſt the will, and in favour of the heir at law.

MR. ATTORNEY-GENERAL now moved for a new trial, becauſe this being the caſe of an inheritance, it is not to be bound by one trial, nor where there are two trials and verdict againſt verdict; that though the laſt verdict is againſt an heir at law, yet he is an heir againſt whom the teſtator had expreſſed a great diſregard in his life-time; that the will was ſolemnly ſigned in the preſence of three witneſſes, and two codicils proved to be wrote by *Elias Turner*, the teſtator's own hand; that there was nothing at all abſurd or inconſiſtent in the will, which firſt provides for the widow, and then beſtows the fortune in favour and for the ſupport of decayed merchants in *London*; that in the caſe of *Leighton v. Sir Edward Leighton (a)* there were four trials in ejectment.

HARDWICKE, *Lord Chancellor*. The Judges of the court of king's bench, before whom the laſt trial was, have certified to me, that they are not only not diſſatisfied, but quite ſatisfied, with the

(a) 1. Peer. Wms. 671.

verdict

verdict againſt which a new trial is now prayed; and as they are ſo, I have reaſon to be ſo too, and cannot take it that anything improper paſſed at the trial. If there is any ground for a new trial, it muſt ariſe from collateral circumſtances, and not from ſuch as were ſubmitted in evidence before the laſt jury. It is inſiſted for the new trial, that here is verdict againſt verdict, for there has been formerly a verdict at *Guildhall*, before WILLES, *Lord Chief Juſtice* of the common pleas, and there the jury found the teſtator *compos mentis*, and THE CHIEF JUSTICE certified alſo that he was ſatisfied with the verdict.

But all this is no reaſon why a third trial ſhould be granted; for A TRIAL AT BAR is a moſt ſolemn act (*a*), and ought to have more weight than a verdict at *niſi prius*. But it is not ſingly the difference of the two trials, but the weight of the new evidence appearing in the laſt trial, which was granted upon freſh evidence, *viz.* letters from one *Ploy* which were not produced at the former trial; and he could not be croſs-examined as to them upon the former trial; and I thought this freſh evidence ſo very material, that I granted the heir at law an opportunity of having them ſubmitted to the ſcrutiny of a jury. This evidence, it ſeems, has had the ſame weight with the ſpecial jury and the court of king's bench as with me; which gives a further ſanctity to this verdict beſides the ſolemnity of the trial.

There is another circumſtance which is an ingredient in the caſe, that this laſt verdict at bar has been found by a jury of gentlemen of the county of *Eſſex*, where the latter part of the life of *Elias Turner*, the teſtator, was ſpent; and they were more proper, from their private knowledge, to try his ſanity than a jury of *London*, he having left the city for ſome years.

There is another reaſon to impeach the verdict in the common pleas at *Guildhall*, that this was a deviſe of a charity for the uſe of the city of *London*, and it was natural for men of *London* to wiſh well to this charity, of which they themſelves might be partakers, or their friends, and this without any plain partiality or corruption of mind; and though I do not do this to impeach their conſciences, yet it leſſens the credit of their verdict, and muſt, without their thinking it, make them a little partial.

As to what has been ſaid, that there have been a great many proceedings in favour of the charity in this court, yet they were all grounded upon, and conſequential to, the firſt verdict; and as that is now laid out of the caſe, all thoſe muſt neceſſarily fall along with it. As to the caſe of *Leighton v. Leighton*, that was a bill for a perpetual injunction, and upon a legal title; there had been two trials at *niſi prius* and two at bar; but that was not like the preſent caſe, for that was upon a legal title, and at a time when the doctrine

(*a*) Reg. v. Bewdley, 1. Peer. Wms. 207. Baker v. Hunt, 3. Atk. 548.

INGRON *againſt* MOULSTON, *et contra*; OR, JENNY VOBE'S CASE.

the caſe of *Jacobſon v. Williams* (*a*). That caſe deſerves to be cited at large, for there is ſomething particular in it; and is thus: *Walter Walinger*, by his will, left his niece, *Elizabeth Taylor*, an infant, one thouſand pounds, payable after the death of the teſtator's wife, and at his ſaid niece's age of twenty years, if ſhe ſhould ſo long live; the niece married *J. S.* without the knowledge or conſent of her father; *J. S.* being at that time much in debt by judgment and otherwiſe, and having gained the young gentlewoman's conſent by bribing her maid-ſervant. The niece was about eighteen. Soon after the marriage, *J. S.* became a bankrupt, and the commiſſioners aſſigned over all the eſtate and effects of the bankrupt to the plaintiffs in truſt for the creditors, who brought the bill for this legacy, the teſtator's widow being dead, and the niece being about twenty years old, and conſequently the legacy due; and the bankrupt had two children by his wife then living. This cauſe coming on before BARON PRICE in the abſence of THE CHANCELLOR, THE BARON, in regard to the creditors, decreed the legacy and intereſt to be paid to the plaintiffs. But upon appeal from that decree to THE CHANCELLOR, his Lordſhip declared, that foraſmuch as the plaintiffs, the aſſignees in the commiſſion, claimed under the bankrupt, they ought not to be in a better caſe than the bankrupt himſelf; and ſince, if he had brought a bill for that legacy, the Court would not have allowed it him without obliging him at the ſame time to make ſome proviſion for the wife and children, ſo, for the ſame reaſon, when theſe claiming under the bankrupt (and who muſt be exactly in the ſame caſe as he himſelf would have been in) come for equity, they ought to do equity, which would be to provide for the wife and children of the bankrupt, from whom they derived their claim; but with regard to the intereſt of the money, as the bankrupt was commonly allowed to receive that, ſo the aſſignees ought to receive the ſame during the bankrupt's life: alſo if the bankrupt's wife ſhould die without iſſue, then the bankrupt would have been allowed to have received the whole money, and therefore in ſuch caſe the aſſignees ſhould be allowed to receive it alſo. MR. VERNON, in this cauſe, cited the caſe of *Taylor v. Wheeler* (*b*) to ſhew, that aſſignees under a commiſſion of bankruptcy are not to be conſidered as purchaſors; and to be ſure it was a very good caſe for that purpoſe, and was thus: *A.* mortgaged a copyhold for a conſiderable ſum, but the conveyance was defective for want of a ſurrender being preſented in time. After which *A.* became a bankrupt; and THE COURT helped the mortgagee of the copyhold againſt the aſſignees under the commiſſion, which he urged to be an argument that the creditors or aſſignees of the commiſſioners are not to be conſidered as purchaſors. Upon another objection in this cauſe, *viz.* that the aſſignment was made before any right to the legacy veſted in the wife, for by poſſibility it might never veſt, becauſe ſhe might die before twenty, the Court ſaid, it was clear that the commiſ-

(*a*) 1. Peer. Wms. 382. (*b*) 2. Vern. 564.

ſioners

ſioners could not aſſign this poſſibility of right which the bankrupt had in the portion; and conſequently, the aſſignees being plaintiffs in the bill, and intitling themſelves under this aſſignment, which is void with reſpect to ſuch poſſibility, therefore the bill muſt be diſmiſſed. Here is a particular train in the report of this caſe; and it looks as if LORD COWPER reſted his opinion upon the aſſignment of the poſſibility's being void; but if he founded his decree upon that only, it was a wrong one, and is not law, for commiſſioners of bankruptcy may aſſign a poſſibility, and it has been ſo determined often; for the words of the act of parliament are, "all that the bankrupt can de-"part with," and a poſſibility may be releaſed or aſſigned in law or equity. And though LORD COWPER mentions the point of the poſſibility at laſt, yet there is nothing in the report which ſhews that he was of a different opinion as to the wife's right of proviſion againſt the aſſignees.

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2. Vern. 563. Thomas v. Freeman.

Another caſe cited at the Bar is that of *Watſon v. Maſter*, before SIR JOSEPH JEKYLL, late *Maſter of the Rolls*, in 1732; and that caſe is as it was cited, and is the ſame reſolution as in *Jacobſon v. Williams*, that aſſignees ſtanding in the place of the bankrupt ſhall not have the wife's fortune without making her a proviſion at the ſame time out of it. But though theſe caſes are ſo in relation to the huſband himſelf, and in relation to voluntary aſſignees or aſſignees under a commiſſion of bankruptcy, yet where the huſband has, for a valuable conſideration, aſſigned a particular ſpecific chattel or debt, whether legal or equitable, which the huſband can reduce into poſſeſſion without coming into this court, or thoſe having concurrent juriſdiction with this as to the thing demanded, there the reſolutions have been contrary, that ſuch aſſignees ſhall not be compelled to make proviſion for the wife; and this is the caſe of *Tudor v. Samyne* (*a*), and was thus: *A.* being poſſeſſed of a remainder of a term for thirty-nine years, conveys it to truſtees for the ſeparate uſe and benefit of the defendant his wife, who marries *B.* a ſecond huſband, who firſt mortgages the term, and then aſſigns it to *C.* who brings his bill againſt the wife and her truſtees, to compel them to aſſign over the legal eſtate to the plaintiff; and decreed accordingly; for as the huſband may diſpoſe of a term for years, where the legal eſtate is in the wife, ſo he may of the truſt of a term without either the wife or the truſtees joining; and *Sir Edward Turner's Caſe* was cited, that a term aſſigned by the firſt huſband for the ſeparate uſe of the wife may be ſold or diſpoſed of by the ſecond huſband. It was objected, that the huſband in this caſe had made no ſettlement or proviſion for the wife; and if he was plaintiff, the Court would not decree the truſtees to aſſign without his making ſome ſettlement on the wife; and the plaintiff, who derives under the huſband, ought not to be in any better condition: *Sed non allocatur.* There was a diſpute at the Bar, whether the

Ante, 376. S. C. cited at large.

(*a*) 2. Vern. 207.

non

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non allocatur was to be applied to the aſſignees making a proviſion, or to the huſband's; and I AM OF OPINION, that it is to be applied to the aſſignees not being obliged to make a proviſion, for the huſband in ſuch caſe would: though it was ſaid, the huſband would not, becauſe this juriſdiction of making proviſion for wives has ariſen ſince that caſe; but that is a miſtake, for that doctrine was very well underſtood at that time; and that appears from *Tothil* as above in the reign of *Charles the Firſt*, and that in its full extent; for the caſe he mentions was of an injunction even to the ſpiritual court. So *Walters v. Saunders (a)* is thus: *A.* made a ſettlement, whereby he created a term for years, in truſt to raiſe four hundred pounds a-piece for his two daughters; one of them married *B* and he and his wife brought a bill, and had a decree to have the four hundred pounds raiſed and paid; but before it was raiſed, *B.* aſſigned the benefit of the decree to one *J. S.* in truſt for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided: the creditors brought a bill to have the benefit of the ſaid aſſignment; and though it was inſiſted upon in behalf of the wife, that there was a difference between a term in truſt to raiſe a ſum of money for a woman and a truſt of the term itſelf for a woman, yet THE MASTER OF THE ROLLS held, that this being a term for years, and not a ſum of money, and therefore not to be diſtinguiſhed from *Sir Edward Turner's Caſe*, he muſt decree it, though againſt his conſcience, that there may be an uniformity of judgments. So is the caſe of *Boſvil v. Brander (b)*: A *feme ſole* was a mortgagee in fee for eight hundred pounds, and married a tradeſman, who becoming a bankrupt, a commiſſion of bankruptcy was taken out againſt him, and the commiſſioners aſſigned over all his eſtate, both real and perſonal: afterwards the huſband died; and the writings relating to this mortgage being in the aſſignee's hands, the widow of the bankrupt brought a bill againſt them for theſe writings, and to have the benefit of the mortgage: the cauſe came on to be heard, and for its difficulty was ordered to be ſpoke to again; when His Honour delivered his opinion ſolemnly for the wife; but afterwards being diſſatisfied with that opinion, he ordered the decree to be ſtayed, and to be attended again by Counſel. Whereupon His Honour gave his opinion, that if there had been any articles before the marriage purporting that this mortgage-money ſhould continue in the wife as her proviſion, or ſhould be aſſigned in truſt for her, they would be a ſpecific lien upon the mortgage, and have preſerved it from the bankruptcy. Alſo it might have been a matter of different conſideration if the aſſignees had been plaintiffs in equity, and deſired the aid thereof to ſtrip an unfortunate widow of all ſhe had in the world, towards the doing of which equity would hardly have lent any aſſiſtance, becauſe the aſſignees claiming under the bankrupt huſband could be in no better plight than the huſband would have been; and if the huſband had in equity ſued for the money, or elſe prayed that the

(*a*) Eq. Caſes Abr. 58. (*b*) 1. Peer. Wms. 458.

mortgagor

mortgagor might pay the money to the huſband without his making ſome proviſion for his wife, or at leaſt the wife, by an application to the Court, might have prevented the payment of the money to the huſband, unleſs ſome proviſion were made for her. But in the preſent caſe, the widow is plaintiff againſt the aſſignees, ſo that ſhe, and not the creditors, ſeeks the aid of equity. And there being in the mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *choſe in action* was well aſſigned by the commiſſioners to the aſſignees, and veſted in them; like the caſe of *Miles v. Williams (a)*, where a bond made to a woman *dum ſola* was adjudged to be liable to a future huſband's bankruptcy, and aſſignable by the commiſſioners. Wherefore if the right to the debt was veſted in the aſſignees, as plainly it was, though the legal eſtate of the inheritance of the lands in marriage continued in the wife, yet this was not material, it being no more than a truſt for the aſſignees: like the common caſe; where there is a mortgage in fee, and the mortgagor dies, here the mortgage-money belonging to the executors, though the heir takes the legal eſtate by diſcent, yet he is but a truſtee for the executor; for the truſt of the mortgage muſt follow the property of the debt, elſe the mortgagor would be in a very hard caſe, liable to be ſued by the aſſignees of the commiſſioners upon the covenant, and alſo in ejectment by the wife of the mortgagee; whereas the latter ſuit would be enjoined by equity. So in the laſt caſe cited, which is that of *Bates v. Dandy (b)*, before me on the ſixteenth of *July* 1742, which will appear to be a caſe much of the ſame kind with the laſt before SIR JOSEPH JEKYLL; for the two mortgages were two ſpecific things, part of the property of the wife from her brother *John Dyer*, of whoſe perſonal eſtate there had been an account taken, the ſhares divided (for there were ſeveral perſons entitled), and the eſtates parted; and there was a declaration ſigned by the parties, that the total amount of the ſurplus ſhould be carried to the account of ſuch partition, and that the mortgage in fee ſhould remain to *William Dandy* and *Mary* his wife; and the deeds were accordingly delivered over to him; he borrows money of *Bates* the plaintiff, and gives him a note to aſſign the mortgage in fee to him, and depoſited the deeds in his hands as a ſecurity till then, juſt as the aſſignees had the cuſtody of the mortgage in the ſaid caſe of *Boſvil v. Brander (c)*, before SIR JOSEPH JEKYLL; and I WAS OF OPINION, that the creditor of the huſband had a lien upon the mortgage, and that I could not take it from him until the money was paid; and though I decreed this part againſt the wife, yet as there was a ſurplus after the payment of *Bates*, I decreed that againſt the repreſentatives of the huſband in favour of the wife. In theſe four caſes laſt cited, the particular contracts of the huſband, and the conſiderations upon which the ſame aſſignments have been made, have got the better of the wife's equity of proviſion; and they ſeem to go upon the ſame ground in two of the caſes, VIZ. *Tudor*

(*a*) 1. Peer. Wms. 249.
(*b*) 2. Atk. 207.
(*c*) 1. Peer. Wms. 458. 2. Eq Abr. 113.

v. Samyne

v. Samyne and *Walker v. Saunders*, as in *Sir Edward Turner's Caſe*, whether rightly applied or not I will not ſay. And the ground in *Sir Edward Turner*'s was, that as the huſband might aſſign a term of his wife's, ſo he might aſſign the truſt of a term, for equity follows the law, and there ought to be the ſame rules of property in equity as at law. The court of chancery at firſt ſhewed great diſſatisfaction at ſuch a determination in THE HOUSE OF LORDS; inſomuch that, in *Pitt v. Hunt* (*a*), the LORD CHANCELLOR NOTTINGHAM, whoſe decree was reverſed in the caſe of *Sir Edward Turner*, ſaid, THE LORDS had altered the law without an act of parliament; but he ſaid, he muſt be concluded by THE LORDS' judgment, for that there muſt not be one ſort of equity above ſtairs in THE HOUSE OF LORDS and another below ſtairs in chancery. But where the huſband has, for valuable conſideration, aſſigned a debt, duty, chattel, or *choſe in action* of the wife's, there this Court has grounded the validity of it upon the authority the law gives the huſband to receive, recover, or get in, ſuch things of his wife's; and where they have been aſſigned ſpecifically for valuable conſideration by the huſband, it will be binding upon the wife.

As to the laſt aſſignment made to the defendants *Maſters* and *Carter*, I AM OF OPINION, that part of the caſe does not differ from that of aſſignees under a commiſſion of bankruptcy; for *Vobe* aſſigns all his goods and chattels generally, and all his right or ſhare of his wife's fortune, and not the thing itſelf; and it is only againſt him, and not againſt the wife.

As to the firſt aſſignment to *Moulſton*, which is in conſideration of a particular debt of ſix hundred and four pounds due from *Vobe* to *Mr. Moulſton*, that is different from the general aſſignment, and differs alſo from all the caſes I have cited; and there are no caſes to come up to it. For firſt, the preſent is the caſe of a mixed fund ariſing from both real and perſonal eſtate; for the father, *Joſeph Burr*, by will has deviſed this real eſtate to truſtees and their heirs, with directions to ſell and turn it into money, and that to be conſidered as perſonal eſtate; but if the debts and legacies of the father had been paid, and all the children had come to age, they, no doubt, might have come againſt the truſtees to have it continued as real eſtate, if it had not been ſold, and they would have had that equity; and in relation to ſuch real eſtate, the wife being an infant, any diſpoſition of it by him would have been void.

SECONDLY, *Mrs. Vobe* was an infant during all this tranſaction, even at the laſt aſſignment, and therefore the peculiar object of the care of this Court. Beſides, the aſſignment was not of a term for years, or of the truſt of a term, or of any ſpecific particular debt, or chattel, or *choſe in action* due to the wife, but it is of the whole fortune; for *Vobe* aſſigns to *Mr. Moulſton* all the ſhare of *Joſeph Burr* the father and *Henry Burr* the ſon's perſonal eſtate which he

(*a*) 1. Vern. 18.

was

was entitled unto in right of his wife, for and towards the payment of the principal and intereſt of *Mr. Moulſton*'s debt; and all this of an aſſignment of ſuch an eſtate or intereſt which the huſband had not, nor could reduce into poſſeſſion without coming into this court, for there had been no partition to bind all the children. The truſtees indeed had, out of their care, paid the children part of their fortunes, and had inveſted four hundred and fifty pounds in ſtocks for *Jenny Vobe*; but this was of their own head; and there could be no account taken to bind the parties, nor could the truſtees joining with the huſband himſelf do it; for the wife was an infant, and if ſhe died before twenty-one there was right of ſurvivorſhip in her brothers to have her ſhare; and if any more of the brothers had died before twenty-one, ſhe would have come in as a partner in their fortunes; ſo that the truſtees, as yet, could not tell what *Jenny Vobe*'s proportion was. Therefore the defendant *Moulſton*, who is plaintiff in the croſs-cauſe, muſt have known, at the time of the aſſignment, that he took an intereſt of the wife's which all the parties joining together could not make ſecure to him without an interpoſition of a court of equity, and therefore muſt take it ſubject to the equity of making a proviſion out of it for the wife.

And in this caſe I lay great ſtreſs upon the aſſignment's being a general one of the wife's whole fortune; and if ſuch aſſignment ſhould prevail againſt the wife, it would defeat all the care and caution of this Court relative to infants; for a man would need only to run away with an infant, and if he could not come at her fortune (if the truſtees ſtood out) without the aid of this Court, to aſſign over her whole fortune for valuable conſideration; and that he might do, though neither he nor the lender might come to the certainty of this, and might only know in the groſs that it was worth the money advanced; and perhaps ſuch huſband might be in debt before his marriage, might be a tradeſman in fear of either arreſts or of a commiſſion of bankruptcy againſt him; and he would not fail in ſuch circumſtances, nay it would be the conſtant caſe for him to aſſign his wife's fortune in this general manner for his creditors, which would leave the widow and children quite deſtitute, and defeat the care of this Court, if ſuch aſſignment were to ſtand.

And this weighs with me, that I ought not to ſuffer ſuch aſſignment to prevail. To this it may be objected, that people will not venture their money upon ſuch aſſignments, where there may be ſome hazards, and where they have not had ſome opportunity of looking into the title and deeds to be aſcertained of the value, and therefore there is no danger of ſuch general aſſignments as the preſent one is. But I fear, if I was once to allow and legitimate theſe proceedings, there would be people enough who would do it; for though they could not tell the abſolute particulars of the fortune, yet they might know it to be ſufficient to pay them.

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THEREFORE I AM OF OPINION, in the preſent caſe, that I ought not to make a decree in the croſs-cauſe in favour of the creditor, *Mr. Moulſton*, or the creditor under the ſubſequent aſſignment.

As to the decree, what LORD COWPER ſays in the caſe of *Jacobſon v. Williams* is material. He ſays, "as to the intereſt, as "the huſband was allowed to receive it, the aſſignees ſhould receive "it during his life; and if the wife died without iſſue, the aſſignees "ſhould have the whole." If this is the rule, *Mr. Moulſton* will be entitled to receive all the intereſt for the life of *Mr. Vobe* the huſband; the conſequence of which will be, that as *Mr. Vobe* is a failing man, his wife and children will be ſtarved, and *Mr. Moulſton* have no great benefit, for he will receive yearly but barely the intereſt of his debt. Therefore I think the beſt way will be, if *Mr. Moulſton* will come into terms, to give the wife and children a proportion of the money, and he to have the reſt himſelf. This way, all will have a benefit; the wife will have an immediate proviſion, and the creditor will have a groſs reſidue.

MR. ATTORNEY-GENERAL then ſaid, that in the caſe of *Richmond v. Taylor* (*a*), the whole money was ordered to be put out at intereſt for the benefit of the wife.

But HARDWICKE, *Lord Chancellor*, ſaid, he had read that caſe, and that he would not have done ſo; and ſuppoſing the wife and children had come againſt the huſband himſelf, he would have only made a proviſion for her and the children after the death of her huſband.

MR. ATTORNEY-GENERAL replied, that in the caſe of bankrupts or failing huſbands it was otherwiſe; for there the proviſion was to be made immediately, becauſe of the inability of the huſband to maintain them; and that was the caſe here.

But HIS LORDSHIP ſaid, the firſt propoſal would be loſt; and accordingly ordered it to ſtand over till the firſt day of cauſes after the firſt Seal after Term, when *Moulſton* and the wife agreed to divide the ſtocks equally between them; and the wife's ſhare was agreed to be placed out at intereſt in the accountant-general's name, and ſhe to have the intereſt to her ſeparate uſe during her life; and after her death, the principal to be divided equally among her children; and if none, the money to be paid as ſhe ſhould appoint.

(*a*) 1. Peer. Wms. 734. 2. Eq. Abr. 516.

Steward

Steward and his Wife *againſt* The Eaſt-India Company. Caſe 133.

In what caſes the court of chancery will or will not permit the books of the *Eaſt-India Company* to be inſpected.

S. C. 1. Eq. Ab. 40. 73.

S. C. 2. Vern. 380.

SIR EDWARD COWEN being ſettled at *Bombay*, in the *Eaſt-Indies*, and having raiſed a large fortune to the value of ſixty-eight thouſand pounds, in order to return it to *England* obtained a bill from the governor and council of *Bombay* upon the *Eaſt-India Company* here for fifty thouſand pounds. Thirty-five thouſand pounds, part of the fifty thouſand pounds, they paid him without ſcruple; but as fifteen thouſand pounds, the remaining part of it, was not paid in caſh, but conſiſted of two bills drawn by *Sir Edward* upon *Mr. Lowther*, his agent at *Surat*, for ſixty thouſand rupees each, they refuſed to pay that until an account came from *Surat* that the two bills had received proper honour by *Mr. Lowther*; which arriving, *the Company* paid it with intereſt from the time it was due. *Sir Edward*, after this, wanted to remit eighteen thouſand pounds more, and paid the money to the governor and council at *Bombay*, and had bills for that ſum on the *Eaſt-India Company*, who refuſed payment, becauſe they ſaid the fifteen thouſand pounds was not paid by *Mr. Lowther*.

A bill was then brought by the repreſentatives of *Sir Edward Cowen* againſt the *Eaſt-India Company* for this ſum of eighteen thouſand pounds.

And upon motion it was prayed, that the plaintiff might be at liberty to inſpect the books and papers at *Surat* and *Bombay* in relation to the tranſaction of two bills drawn on *Lowther*, and that the factor might produce them upon oath.

HARDWICKE, *Lord Chancellor*. This caſe is different from that of a ſtockholder of the Company, who is a member of it, and has a right to inſpect ſuch books wherein his ſtock is contained as much as a copyholder has to examine the rolls of the manor which relate to his own title. The modern way has been to ſhorten anſwers more than formerly. The antient method was, that where the anſwer was deficient, the plaintiff continued excepting till a full anſwer was put in; or if the bill was inſufficient to produce a ſatisfactory anſwer, the plaintiff amended it; but at this day, where the defendant does not ſet forth deeds and writings fully, the Court gives the plaintiff a liberty, upon motion, of inſpecting them, and of having them delivered to him by the defendant for that purpoſe upon oath, and alſo to take copies of them.

The motion here is, that as the *Eaſt-India Company* have put in an anſwer that the entries and writings ſpecified in their anſwer are all which relate to the tranſaction of the fifteen thouſand pounds, as they are informed by their factors at *Bombay* and *Surat*, that that is not ſatisfaction enough to the plaintiff, as Companies do not put in their anſwers upon oath, nor do the factors ſwear that theſe are all the entries. The plaintiffs, therefore, move to have theſe books and entries inſpected, and the factors to be examined touching

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was very much debated, and wherein he reverſed the decree at the Rolls, he ſent the point to be determined at law; and in ſuch action of *trover* there will be tried, not only the queſtion of factors in general, whether ſuch aſſignments will alter the property of their principal's goods, but alſo the queſtion, whether the factors were bankrupts at the time of ſuch aſſignment? If they were, it will impeach the aſſignment that way. The conſequence of all this will be, if the aſſignment paſſes no property, you will have your goods returned in ſpecie; if it do paſs a property, the defendant will only be entitled to his debt out of them, and the remainder will belong to the plaintiff; but this is proper to give directions about after the trial has been at law *(a)*.

(a) This cauſe was tried at *Guildhall* in Hilary Term 16. *Geo.* 2. before LEE, *Chief Juſtice*, who held, that though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and receipt, S. C. 2. Stra. 1178.; and therefore if a factor pledge the goods of his principal, the principal may recover the value of them in an action of *trover* againſt the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee, Daubigny v. Duval, 5. Term Rep. 604.

Caſe 138.

La Noy *againſt* The Ducheſs of Athol.

In Chancery, Michaelmas Term, 16. Geo. 2. 1742.

2. C. 2. Atk. 444.

MR. LA NOY, upon his marriage with *Jane Frederick*, now *Ducheſs of Athol*, and mother of the plaintiff, by indentures dated the twenty-eighth and twenty-ninth of *January* 1718 ſettled his eſtates in *Hammerſmith* and *Fulham* to the uſe of himſelf for life; and after his deceaſe, to the intent that *Jane* might have a rent-charge of five hundred pounds a-year in lieu of dower, remainder to his heirs male; remainder to *Mr. La Noy* in fee. In this ſettlement *Mr. La Noy* covenanted, that if *Jane* ſhould ſurvive him, his heirs, executors, or adminiſtrators, would pay her the ſaid five hundred pounds a-year. After the marriage, *Mr. La Noy* ſurrendered ſome copyhold eſtates to the uſe of his will; and in 1719 bequeathed the reſidue and remainder of all and ſingular his eſtate, both real and perſonal, wholly and ſolely, after paying his juſt debts, unto the defendant *Jane*; and appointed her ſole executrix; but in caſe he ſhould leave any iſſue male by the ſaid *Jane*, then he gave to ſuch iſſue his eſtate at *Hammerſmith*, freehold, copyhold, and leaſehold, he paying to his mother five hundred pounds a-year; but if he left only a daughter, then his wife ſhould pay her when ſhe married, if it was with her mother's conſent, ſix thouſand pounds. By indenture dated the twenty-firſt of *October* 1723, reciting, that *Mr. La Noy*, in right of his wife, was entitled, by her father's death, to a large ſum of money, he, in conſideration thereof, covenanted to levy a fine of the eſtates comprized in the indentures of the twenty-eighth and twenty-ninth of *January* 1718 to the uſe of himſelf for life; and after his deceaſe, to

ſecure

ſecure the ſaid *Jane* the ſaid rent-charge of five hundred pounds for life, in bar of dower; remainder to truſtees for a term; remainder to the firſt and other ſons in tail male; remainder to the heirs of the body of *Mr. La Noy*; remainder to himſelf in fee. The truſts of the term were to raiſe ſix thouſand pounds for daughters portions, if no iſſue male, and maintenance at the rate of eighty pounds a-year. *Mr. La Noy* died, leaving the plaintiff, his daughter and only child. *Jane* married the *Duke of Athol.*

Upon hearing this cauſe, Lord Hardwicke declared, that the ſettlement in 1723 was a revocation of the will as to the freehold and leaſehold eſtates compriſed in that ſettlement, and as to the legacy of ſix thouſand pounds bequeathed to the plaintiff; but as to all freehold and copyhold lands not compriſed in the ſaid ſettlement, the ſame belonged to *Jane* and her heirs by virtue of the ſaid will; and his Lordſhip decreed, that the defendant *Jane* ſhould come to an account for the rents and profits of the premiſes compriſed in the ſettlement of 1723 ſince the teſtator's death: and the ſaid defendant was, in the firſt place, out of the rents and profits, to deduct and retain to her own uſe five hundred pounds a-year; and in the next place, ſhe was to deduct two hundred and ninety-three pounds for fines and charges of renewing the leaſehold eſtate; and alſo to retain eighty pounds a-year for the maintenance of the plaintiff: and the ſaid defendant *Jane* was to account annually for the rents and profits, and to make the like deductions.

The plaintiff petitioned for a rehearing, ſhewing, that accounts had been taken by the Maſter ſince the decree, and he had made his report, whereby it was ſtated, that the rents and profits had been yearly deficient to anſwer the ſaid five hundred pounds a-year, the ſaid eighty pounds a-year, and the fines; ſo that there was a balance due to the defendant of three thouſand nine hundred and thirty-ſeven pounds, which they were to retain out of the next rents and profits; and in conſequence of this, if the defendant *Jane* was to live a few years longer, and ſuch arrears were conſidered as a charge upon the freehold and leaſehold eſtates, the plaintiff would be deprived of her portion of ſix thouſand pounds, and alſo of her inheritance.

Hardwicke, *Lord Chancellor.* This cauſe comes to be reheard after a great length of time; but that is no objection here, becauſe at the original hearing *Miſs La Noy* was an infant, about three years of age, and has but lately attained her age of twenty-one, and comes in time to complain if ſhe was aggrieved by that decree. It has been mentioned, that it appears by the proceedings in the cauſe that there was a ſurpriſe upon the Court, all the facts not being ſufficiently ſtated in the pleadings. But that objection ought to be laid out of the caſe, for I have read over the decree in which the pleadings are recited, and it there appears, that the material points in the cauſe, and all that the parties could then foreſee, are put in iſſue for the judgment of the Court; the two ſettlements are truly ſtated, except as to the covenant for payment of the rent-charge of five hundred pounds a-year; and I cannot impute

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impute that omiſſion to any deſign, becauſe it is probable there might be no occaſion or reaſon to make uſe of that covenant; and therefore it was not ſtated in the bill. The will of *Mr. La Noy* is alſo ſet forth; and the great point as to the ſtocks and annuities which ſtood in the joint names of the huſband and wife at the time of the death of the huſband was not only ſtated in the bill, but alſo inſiſted upon by *the Ducheſs*'s anſwer; with this further, that the pleadings do not repreſent the caſe as if the eſtate would in all events anſwer the annuity of five hundred pounds a-year, and all other charges upon it, becauſe *Mrs. La Noy* expreſsly ſtates deficiency in her anſwer, therefore no deſign to prejudice the intereſts of the infant. But if anything has been omitted, though without deſign, or if the Court has erred in judgment, the plaintiff, *Miſs La Noy*, is intitled to have the decree rectified, and to be relieved.

The objections againſt the decree are: FIRST, That there is a direction given in it for the payment of five hundred pounds a-year for *Mrs. La Noy*'s jointure, as alſo of eighty pounds for *Miſs La Noy*'s maintenance, out of *Mr. La Noy*'s real eſtate, whereas the real eſtate falls much ſhort of doing this; for though it is recited in the ſettlement to be a thouſand pounds a-year, it is, in reality, no more than four hundred pounds; therefore *Miſs La Noy*, the plaintiff, is entitled, as heir to her father, to have her inheritance exonerated, and the five hundred pounds a-year and eighty pounds a-year maintenance conſidered as debts, and to be turned firſt upon the perſonal eſtate of *Mr. La Noy*; and if that is deficient, then upon the copyhold eſtate deviſed by him, ſubject to the payment of his debts; and this becauſe there is a covenant in the ſettlement, that in caſe his wife ſurvive him, his heirs, executors, or adminiſtrators, ſhall pay to her, for her life, the five hundred pounds a-year without deduction, except for land tax; and that therefore this makes the five hundred pounds a-year a debt upon the perſonal eſtate, ſo as it ought to be ſatisfied, in the firſt place, out of that.

As to the five hundred pounds a-year, the objection is carried too far; though there is one kind of relief which I will mention juſt now; for though there is a covenant of ſuch ſort as binds the perſon as well as his land, yet it is truly ſaid by the Counſel for the defendant, that the perſonalty was not the original fund chargeable with this annuity (*a*); and in that reſpect it differs from mortgages or other incumbrances upon eſtates; for if a man borrow money, and make a mortgage, with a perſonal covenant for the payment of the money, and alſo give a bond at the ſame time, there being in this caſe borrowing and lending, that which is the moſt natural fund for payment of debts ſhall be firſt applied,

(*a*) Burgoyne *v.* Fox, 1. Atk. 575. Galton *v.* Hancock, 2 Atk. 435. Coventry *v.* Coventry, 2. Peer. Wms. 222. Edwards *v.* Freeman, 2. Peer. Wms. 436. Evelyn *v.* Evelyn, 2. Peer. Wms. 664.

which

which is the perſonal eſtate, and the mortgage is no more than a ſecurity (*a*).

But this application of the perſonal eſtate was never carried ſo far as to pay proviſions for wives or children chargeable upon land, becauſe the land is the primary or original fund, and whoever takes the eſtate muſt take it ſubject to ſuch lien. Therefore upon the ſettlement in 1718, in conſideration of marriage, which is a good conſideration (*b*), *Mr. La Noy* ſettles a real eſtate of the value of one thouſand pounds *per annum*, as he recites it, upon himſelf for life, with a rent-charge of five hundred pounds a-year to his wife for a jointure, and, ſubject thereto, to the heirs male of his body generally, with remainder to his own right heirs. Upon this firſt ſettlement, *Miſs La Noy* ſhould take this eſtate only as right heir to her father, and as ſuch has no right to come againſt the perſonal eſtate, and out of that to diſencumber the real eſtate of a debt brought upon it by theſe very ſettlements under which ſhe takes. Suppoſe there had been a ſon, and he had taken it by virtue of the limitation to the heirs males of the body of *Mr. La Noy*, and ſo had taken *per formam doni*, he could not diſencumber it out of the perſonal eſtate, becauſe he takes it under the very ſettlement, ſubject to the mother's annuity, which is originally charged upon the eſtate itſelf; and it is ſo in all caſes of portions for younger children: as if a man ſettle his eſtate for life, remainder to his wife for a jointure, remainder to truſtees for five hundred years for younger children's portions, remainder to his firſt and other ſon in tail male, the eldeſt ſon cannot come againſt the perſonal eſtate to diſcharge his inheritance out of it; and there never was a decree, for he muſt take it charged; therefore the plaintiff, upon this part of the caſe, cannot be entitled to throw the annuity upon the perſonal eſtate in diſcharge of the inheritance, eſpecially upon the firſt ſettlement.

Upon the ſecond, there is no recital of the value of *Mr. La Noy*'s eſtate; but in conſideration of the ſubſequent fortune which came to the wife by the death of the father as a ſhare of his perſonal eſtate, the huſband levies a fine to deſtroy the uſes of the former ſettlement, and makes a new one to himſelf for life; then to the intent that his wife may receive five hundred pounds a-year for her life as a jointure; then for a term of two hundred years to raiſe portions for daughters, *viz.* of ſix thouſand pounds, in caſe there ſhould be a ſon; or in caſe there ſhould be only daughters and no ſon, with remainder to the heirs of his own body, with a remainder to his own right heirs. Upon this ſettlement *Miſs La Noy* has no title to exonerate the real eſtate of this jointure of five hundred pounds a-year, by throwing it upon the perſonal eſtate, becauſe ſhe

(*a*) Cope *v.* Cope, 2. Salk. 449. Meynell *v.* Howard, Prec. Ch. 61. King *v.* King, 3. Peer. Wms. 358. 2. Atk. 496. Tankerville *v.* Fawcett, 2. Brown. C. C. 57. Ward *v.* Dudley, 2. Brown. C. C. 316. Billinghurſt *v.* Walker, 2. Brown. C. C. 604.

(*b*) *Ex parte* Marſh, 1. Atk. 158. Brown *v.* Jones, 1. Atk. 190.

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does not take as a purchaſor by virtue of the uſes of this marriage-ſettlement; for, in the firſt place, it is a ſettlement after marriage; and laſtly, there is no covenant in regard to the inheritance to diſcharge it of this annuity: and as to the inheritance of the eſtate itſelf, ſhe takes it under a general limitation to the heirs of the body of the father; and if *Mrs. La Noy* had died, leaving iſſue a daughter, and after *Mr. La Noy* had married again, and had iſſue a ſon, the other ſon would have taken the eſtate before her; which ſhews, ſhe did not take as a purchaſor under this marriage. BUT I AM OF OPINION, upon this ſecond ſettlement, that there is an equity in *Miſs La Noy*, the plaintiff, to turn the *Ducheſs of Athol*, in ſome degree, upon the perſonal eſtate of *Mr. La Noy*; and that in relation to ſix thouſand pounds provided by the ſecond ſettlement for daughters portions, ſhe ſhall ſtand, as to the perſonal eſtate, in the place of the *Ducheſs of Athol*, her mother, and be ſatisfied out of that.

As to this ſix thouſand pounds, ſhe takes it as the only daughter of the marriage, either as a purchaſor of it by virtue of that conſideration accruing to the father by the acceſſion of the fortune of the mother, or, laying that out of the caſe, ſhe is a child claiming a proviſion, and therefore in this court in the nature of a creditor. If that be ſo, What will be the effect in a court of equity? In taking the account, there appears to be a great deficiency of near four thouſand pounds, which, as has been obſerved, muſt run on as a burthen upon the enſuing profits, and upon the inheritance, with intereſt; ſo that if *the Ducheſs* ſhould live to grow old, nay only to arrive to a natural age, it will exhauſt the inheritance itſelf, and ſo the ſix thouſand pounds can never be raiſed, becauſe the annuity is prior to it, and has ſwallowed up the eſtate which was the fund for it; therefore it is incumbent upon the Court, as far as it can, to preſerve both rights. *The Ducheſs* has two funds for her jointure; the real eſtate, and a covenant for the payment of it by *Mr. La Noy*, his executors, adminiſtrators, or aſſigns, which raiſes a charge upon the perſonal eſtate; and it is the conſtant courſe of this court, if there are two creditors, one having a double fund for his ſecurity, and the other only a ſingle one, to turn the former to take his ſatisfaction out of that fund, in the firſt place, which the latter has no right to come upon, that the ſecurity of the other may be as little prejudiced as poſſible. Suppoſe a man ſeiſed of two real eſtates, make a mortgage of both to one perſon, to ſecure the ſum of a thouſand pounds, and afterwards makes a ſecond mortgage of one of thoſe real eſtates only to another, who has no notice of the former mortgage; in this caſe the firſt mortgagee ſhall be compelled, in the firſt place, to take his ſatisfaction out of that real eſtate, which was not compriſed in the ſecond mortgage, in order that the ſecond mortgagee may have his full benefit of the eſtate included in his mortgage; and this though theſe two eſtates may deſcend into different hands, or to be ſettled different ways.

And

And I am of opinion, that the plaintiff, *Miſs La Noy*, to ſecure her own ſix thouſand pounds and her maintenance of eighty pounds a-year (as they are charges upoh the ſame fund with which *the Ducheſs* is a creditor, and prior to *Miſs La Noy*), has a right to turn *the Ducheſs*, who has a double fund for her ſecurity, upon the perſonal eſtate, or upon the copyhold eſtate deviſed for payment of debts; and that as to the ſix thouſand pounds and maintenance, ſhe ſhall ſtand in the place of *the Ducheſs*, and have her ſatisfaction out of the real eſtate. The caſe I have mentioned, and ſeveral other caſes, are proofs of it; there is alſo a ſtrong caſe to this purpoſe in 1. *Vern.* 219. *Reeve v. Reeve*, and the ſame caſe in 2. *Vent.* 363. where *Sir Richard Reeve* charges his lands in *B.* with a portion of three thouſand pounds for his daughter by a former *venter*, and then marries a ſecond wife, and makes her a jointure of half the lands at *B.* without taking notice of the charge of three thouſand pounds; and afterwards thinking the portion would defeat the jointure in *B.* takes notice thereof, and deviſes to his wife other lands in *D.* in lieu of her jointure in *B.* and dies. She and the ſon and heir agree together to defeat the daughter of her three thouſand pounds; and therefore the wife, finding that the ſettlement which was made on her marriage, though ſubſequent in time, would prevail againſt the three thouſand pounds charge, which was voluntary and fraudulent as to her, adheres to her jointure, and refuſes to accept the deviſe; and the daughter's bill was to be relieved: and the Lord Keeper decreed, that the plaintiff ſhould hold ſuch part of the lands in *D.* as ſhould be equal in value to ſuch of the lands in *B.* as were compriſed within the jointure until her portion was raiſed. Now this was putting the daughter in the place of the mother ſo far: and it was ſtronger than the preſent; for the charge there for the daughter was only voluntary, and not for a valuable conſideration, as here; and the decree there was upon the ſame foundation as here, which was to preſerve the rights of both parties.

The next queſtion relates to the eighty pounds a-year maintenance for *Miſs La Noy*; and as to that there is no ground, as it ſtands originally upon the foot of the ſettlement, to ſay, that it can be a charge upon the perſonal eſtate, for there is no perſonal covenant for the payment of it; but the maintenance will ſtand upon the ſame foundation as the portion, which is, that the fund not being ſufficient for both, and the mother having a right to come upon the perſonal eſtate, the daughter ſhall, *pro tanto*, ſtand in her place.

It has been objected, that the mother ought not to have this whole eighty pounds a-year for the maintenance of her daughter, eſpecially in her tender years, when ſhe could not be ſuppoſed to lay out half ſo much upon her; and that by the law of nature ſhe ought to maintain her out of her own eſtate. But this is carrying the point too far, and the mother muſt have the eighty pounds a-year, becauſe ſhe has maintained her child. In caſe where a

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legacy is given to a child for a portion, and not made payable till twenty-one, and no expreſſions in the will for it to bear intereſt in the mean time, the mother, even there, ſhall not be obliged, out of her own bounty, to maintain her child; but this Court will conſtrue the legacy to bear intereſt, upon a preſumption, that as the teſtator intended it as a portion, he muſt neceſſarily intend it to bear intereſt; otherwiſe the poor child, in all likelihood, will ſtarve in the mean time.

The utmoſt that the Court does in caſes of maintenance is, where there is a large eſtate which comes to an elder ſon, and there is no proviſion for daughters or younger children, the Court will order a larger proviſion for ſuch elder brother, that the children may have a maintenance out of that, upon a preſumption, that if the elder brother was at age, he would be the houſekeeper of the family, and would make his younger brothers and ſiſters welcome, as his Lordſhip expreſſed it, to a running in his kitchen.

As to the queſtion relating to the ſtocks ſtanding in the joint names of the huſband and wife at the time of the death of *Mr. La Noy* the huſband, the caſe is thus: *Mr. La Noy* married *Mrs. Frederick*, the preſent *Ducheſs of Athol*, when ſhe had no portion; and in conſideration of marriage, makes her a jointure of five hundred pounds a-year. After the marriage, by the death of *Mr. Frederick* her father, who, by a decree in this court, was conſtrued to be a freeman of *London*, ſhe became intitled to a fifth ſhare of the orphanage part of his perſonal eſtate, which ſhare this Court ordered to be transferred to *Mrs. La Noy*, and not to the huſband. But however the ſtocks, to the amount of fifteen thouſand pounds, were transferred to them in their joint names. By this, the huſband had a power over the ſtock ſo as to reduce it into poſſeſſion; but as it was a *choſe in action*, and he had not altered the nature of it, by his death the wife had a double claim: the one, as it was a *choſe in action* in her right unreduced it would belong to her, and not the perſonal repreſentatives of her huſband; the other, that as it was in their joint names ſhe took it by ſurvivor. This, to be ſure, would be the law if nothing further had been done; but the caſe does not reſt here; for after the augmentation of fortune in right of the wife, *Mr. La Noy* makes a ſecond ſettlement, wherein he recites that *Mrs. La Noy* was entitled to long annuities, and other perſonal eſtate of her father, to the amount of fifteen thouſand pounds, and that he, in right of his wife, became intitled to them; in conſideration whereof he revokes the uſes of the former ſettlement, and as an augmentation thereof ſettles the long annuities of three hundred pounds a-year to her for life alſo, remainder to his firſt and every other ſon in tail male, &c. ſubject to a term to raiſe ſix thouſand pounds as a portion for younger children. After this ſettlement, *Mr. La Noy* dies in the life-time of his wife, leaving theſe joint ſtocks untransferred and unaltered; ſo that in point of law they veſt in the wife by ſurvivor. But the plaintiff inſiſts, and the ſame point was inſiſted upon for her at the original hearing before LORD KING, that though they are ſurvived to the wife at law, yet ſhe is to be conſidered only as truſtee of them, for the benefit of the perſonal repre-

repreſentatives of the huſband, who are become purchaſors of them, and of all the wife's fortune, by the laſt ſettlement made by the huſband in conſideration of her acceſſional fortune.

I had at firſt ſome doubt upon this head; but upon looking into the caſes I AM OF OPINION, that I cannot carry this doctrine ſo far as the plaintiff inſiſts, *viz.* to have theſe ſtocks conſidered as part of the perſonal eſtate of the huſband, and to take them from the wife. There have been ſeveral caſes where a wife has been intitled to a portion, and before marriage (the wife being of age upon agreement with her, or the wife being under age with the conſent and agreement of her father, truſtee, or guardian), the huſband has made a ſettlement upon her in conſideration of or previous to ſuch marriage, and in conſideration of her portion, which conſiſted in *choſes in action*, and the huſband has died without reducing them into poſſeſſion, this Court has decreed in favour of his repreſentatives againſt the wife; much more would it do ſo in favour of creditors, for the increaſe of the huſband's perſonal eſtate. And this has gone ſo far, that where the ſettlement made by the huſband could not be ſaid to be an adequate one to the wife's fortune, yet as it had been the agreement of the parties, and the portion had been the motive of the ſettlement, the repreſentatives of the huſband have been decreed the portion againſt the wife. But all theſe caſes are of ſettlements or articles before marriage for valuable conſideration, and not where they have been either voluntary, or the wife under coverture; and in the general caſes the ſettlements have not been adequate to the fortune; and that expreſſion is only made uſe of where the general doctrine is laid down; and where you examine ſtrictly the caſes, the ſettlement has not been adequate; and yet the ſettlement has prevailed ſo far as to make the wife a truſtee of her own *choſes in action* in favour of the huſband's repreſentatives. The preſent ſettlement is upon a very great acceſſion of fortune made after marriage, and during the coverture; and if this ſettlement is to be tried by the rule laid down, of its being an adequate one, it is plain it is not, for the huſband ſettles nothing new, but only a proviſion of ſix thouſand pounds for daughters; the lands ſettled are barely the lands ſettled before; the jointure of the wife is only increaſed by three hundred pounds a-year out of long annuities only, which were her own eſtate. This is, indeed, a proviſion, but does not come within the meaning of this rule when the Court ſays the ſettlement is to be adequate. But that is not the thing I reſt upon; for this is a voluntary ſettlement, and after marriage, and therefore no contract which is binding upon the wife, ſhe being a *feme covert*, and unable to contract; and there were no perſons, father or other truſtee, to contract for her; the mother indeed is party to the ſettlement, but ſhe had no power to agree for her. If this ſettlement had come before this Court, it would have gone before the Maſter to have received propoſals for ſuch a ſettlement, and ſhe might have been examined in court, or before the Maſter, to expreſs her conſent to the ſettlement, and to the huſband's having her fortune, in the ſame way as a woman who is married is examined apart upon her levying a fine.

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Now this way the wife might have been bound by the ſettlement (*a*), and the huſband's repreſentatives entitled to theſe *choſes in action*. But to ſay ſhe is bound by this ſettlement, by which ſhe takes nothing, except out of her own portion, without the intervention of this court, is carrying it further than any of the caſes. If you look into the caſe of *Adams v. Cole* (*b*), which is the ſtrongeſt that can be mentioned, the proviſion there, indeed, made for the wife was not adequate, but it was an agreement before marriage, and alſo a bond given by the huſband in conſideration of marriage, and therefore an agreement when the wife was capable of contracting. And in that caſe my LORD TALBOT lays it down over and over, that it was the agreement of the wife, though no adequate ſettlement; that the wife, before matrimony, was capable of bargaining, and of parting with her fortune, upon what terms ſhe pleaſed; and that ſhe was bound by it; which holds not in the preſent caſe. And the preſent caſe is ſtronger from the intent of the parties. The recital was, that *Mr. La Noy* was intitled to this ſtock in right of his wife, and he takes the tranſfer to himſelf and wife jointly; he had it in his power to reduce or ſell theſe ſtocks if he thought fit. His being intitled in right of his wife to theſe ſtocks, though he was only to have the benefit of them for his life, would be a good conſideration for this ſettlement; and he might intend, by taking the transfer jointly, to have it in his power to ſell theſe ſtocks, or, if he did not, to leave them to the direction of the law to ſurvive to his wife; and I will not take them from her in oppoſition to the intention of her huſband.

AND HIS LORDSHIP DIRECTED an account of what was due for the portion of ſix thouſand pounds, and alſo for the rent-charge of five hundred pounds a-year: he alſo directed the eſtates to be ſold, and, with the conſent of the defendants, ordered a value to be ſet on the annuity of five hundred pounds; and that the money ariſing by ſuch ſale or ſales ſhould, in the firſt place, be applied to pay the value of the ſaid annuity, and, in the next place, the arrears of maintenance, and then the portion of ſix thouſand pounds and intereſt: and in caſe the money ariſing by ſuch ſale ſhall not be ſufficient to anſwer the ſix thouſand pounds and intereſt, then the plaintiff is to ſtand in the place of the defendant the *Ducheſs of Athol*, to have the benefit of the covenants contained in the ſettlement of 29th *January* 1718 for payment of the annuity, and by virtue thereof to receive a ſatisfaction for the deficiency of her portion of ſix thouſand pounds and intereſt out of the perſonal eſtate of her father *James La Noy*; and if the perſonal eſtate ſhould prove deficient, then out of the freehold and copyhold eſtate deviſed by the will for the payment of debts.

(*a*) Willats *v.* Cay, 2. Atk. 67. Oldham *v.* Hughes, 2. Atk. 454. Milner *v.* Colmer, 2. Peer. Wms. 642. Fraſer *v.* Baillie, 1. Brown C. C. 518. Minet *v.* Hyde, 2. Brown C. C. 663. Dimmock *v.* Atkinſon, 3. Brown C. C. 195.

(*b*) 2. Eq. Abr. 143. Caſes Temp. Talb. 168.

The

The Attorney General *againſt* Baliol College, Oxford. Caſe 139.

In Chancery, December 11, 1744.

Caſe on a bill againſt the truſtees of *Mr. Snell's* charity, praying an account of the funds, and that the court of chancery will direct the manner in which the objects of the charity ſhould be ſubſequently purſued.

HARDWICKE, *Lord Chancellor*. In this cauſe, which is brought here by the principal and regents of the univerſity of *Glaſgow*, in *Scotland*, in the name of THE ATTORNEY GENERAL, there are two ſorts of relief prayed againſt the different ſets of defendants, which are two: The one the maſter and ſcholars of *Baliol College*, in *Oxford*, in their corporate capacities, the maſter and ſix ſenior fellows of the ſame college in their natural capacities as truſtees, the vice-chancellor of *Oxford*, the provoſt of *Queen's*, the preſident of *St. John's*, and the maſter of *Baliol*. The other ſet are, the repreſentatives of *Mr. William Spinks*, in relation to a leaſe taken of the conteſted lands, and afterwards aſſigned to him: and there are the truſtees of the original leaſe, as alſo other perſons brought before the Court, againſt whom no relief is prayed.

As to THE FIRST SET, there are two kinds of relief aſked: The firſt, to have a general account taken from the beginning of the rents and profits of the charity-eſtate, and how they have been applied for the benefit of the charity; and that ſuch parts as have not been applied may be conſidered as ſo much money in the hands of the college to be applied to the charity. The other relief prayed againſt them is, to have the direction of this Court for the eſtabliſhment and regulation of this charity for the future: and this laſt is not oppoſed by any of the defendants.

As to the firſt head of relief, it muſt be conſidered upon the will of *Mr. Snell* in 1672, at which time, by the laws of *Scotland*, epiſcopacy was the eſtabliſhed conſtitution of that Church; and by that will *Mr. Snell* deviſes ſome annuities for lives, which are ſince fallen in, and ſome legacies, which are paid; and then gives the reſidue of his eſtate to truſtees, and directs them to convey and ſettle it upon five or more perſons, and their heirs, to be nominated by the vice-chancellor of *Oxford*, the provoſt of *Queen's*, the preſident of *St. John's*, the maſter of *Baliol*, or any three of them, upon truſt, that the profits and produce ſhall be applied for the maintenance of a number of ſcholars born and educated in *Scotland*, who ſhall have ſpent two years at leaſt as ſtudents in the univerſity of *Glaſgow*, or one year there, and two more in ſome other *Scotch* univerſity; and ſuch ſcholars are to be entered of ſuch college or hall in *Oxford*, and to have ſuch exhibitions or allowances as the ſaid vice-chancellor, &c. or any three of them, ſhall appoint. The number, indeed, of ſcholars is directed not to be under three, and not to exceed five, unleſs the produce ſhall reach to maintain more. Such ſcholars are alſo directed to be bound in proper ſecurity, upon their admiſſions, to forfeit five hundred pounds a-piece if he ſhall enter into holy orders in *Oxford*, and ſhall, after ſuch admiſſion into his holy orders, accept of any ſpiritual promotion either in *England* or *Wales*, "it being my will and deſire, that every ſuch

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"ſcholar ſhall return into *Scotland*, to be preferred there as his "merit ſhall deſerve." The college of *Glaſgow* are to recommend ſcholars to the vice-chancellor, &c. upon any vacancy under the college ſeal; and no ſcholar is to take benefit of the exhibitions above ten years. That ſuch ſcholars, before admiſſion, ſhall be probationers for ſix months at their own expence Three of the beſt ſcholars are to have an extraordinary premium of five pounds a-year a-piece, five pounds a-year allotted for a dinner, and ten pounds a-year to the regiſter, who is to make the ſecurities.

Since this will, and before the charity came to be eſtabliſhed in this court, the Church of *Scotland* was altered, and preſbytery reſtored. Upon this accident, I had ſome doubt how far this will could be carried into execution, becauſe of the ſtate of the *Scotch* Church; for the bond was to be given upon condition not to take any ſpiritual promotion in *England* or *Wales* after admiſſion into *holy orders* in *Oxford*. "Holy orders" in the will muſt mean epiſcopal, for thoſe were then the holy orders which prevailed in *Scotland*; and it would be an abſurd thing for a perſon to receive preſbyterian orders at this time in *Oxford*. But I am delivered from that doubt, becauſe, upon looking into a decree made in 1691 by the lords commiſſioners of THE GREAT SEAL, which was the original decree, and which is recited by LORD SOMERS in a later one, I find this very objection inſiſted upon againſt the charity by the heirs at law of *Mr. Snell*, where they urge, that the Church of *Scotland* had been altered by two acts of parliament; that inſtead of epiſcopacy preſbytery now prevailed, which made the execution of the charity impoſſible; and that therefore there was a reſulting truſt for the heirs at law. But by the decree of the Lords Commiſſioners it is declared, that the defendants, the heirs at law, could take nothing, nor ought to have any benefit by the teſtator's will. And therefore an account was decreed; and after it was taken, there were directions given for the regulation of this charity, which will now fall under the conſideration of this Court. Beſides, the heirs at law have acquieſced under this decree ever ſince. And the directions complained of are, that the ſurplus of profits, after maintaining a particular number of exhibitions, is to go to *Baliol College* for the benefit of the library, which the ſcholars are to have the uſe of; that the truſtees ſhall have power to make leaſes at the clear yearly rent of three hundred pounds, for any determinate time not exceeding twenty-one years; that that decree ſhall be ſubject to ſuch farther alterations and amendments as ſhall be properly required; and the truſtees are to be indemnified under that decree.

Charity.

The beſt way to regulate charities is to have ſchemes laid before the Maſter.

Theſe directions are looſe, and too general; and the beſt way would have been, to have ſent it before the Maſter to accept a ſcheme, upon which things would have been conſidered more minutely and exact. However it appears, that in the year 1699, at fartheſt, complete notice was given of this decree by the maſter and ſcholars of *Baliol* to the heads of the univerſity of *Glaſgow*, and a demand made to them to recommend ſcholars purſuant to the will

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will and the decree; and in the inſtrument of notice and demand there is a recital of the decree itſelf. Thus it has reſted from that time to the filing of this bill; and the firſt relief prayed by it is, to have a general account from the time of the will; but that is inconſiſtent with that decree. But the univerſity of *Glaſgow* objects to the validity of the decree itſelf as againſt them, that it cannot be concluſive upon them, becauſe they were not parties, and that the directions are not conformable, but repugnant, to the will of the donor. As to their being not parties, that will not avail them much; for that information was not brought in a colluſive ſecret manner, but in the name of *Sir George Treby*, attorney-general, at the relation of the vice-chancellor of *Oxford*, *&c.* The defendants were the heirs at law, the widow and truſtees under the will. *Glaſgow* indeed was no party, nor indeed were the plaintiffs obliged to make that Univerſity party, for it is a corporation, and out of the kingdom and reach of the proceſs of this court, which is always an excuſe for not making them parties: therefore that is no objection to make this a void decree as to them. And the Court was ſo cautious as to reſerve liberty to make any alterations in the decree; perhaps for this reaſon, becauſe, as *Glaſgow* could not be a party by compulſion, that nevertheleſs it might apply by petition to have any amendments in the decree: but that they omitted to do till very lately, although they had notice of it from 1699, and knew the advantages which *Baliol* claimed from it, and though they had ſo eaſy a method to do it in as by petition.

Parties to bills. No need to make people parties to a bill who live out of the proceſs of the court; and a decree will not be void againſt ſuch perſons, though they are not made parties; but it is uſual, in ſuch caſes, to reſerve liberty to apply for further directions, that perſons out of the proceſs of the court may not be quite concluded, but may have liberty to apply for alterations in the decree by petition.

The other objection is upon the merits of the decree itſelf, that the directions are improper, and not agreeable to the will of the giver, becauſe there are liberties given for leaſing the eſtate at the clear rent only of three hundred pounds a year, and the ſurplus of the rent, above maintaining a certain number of exhibitioners, is to be applied for the benefit of *Baliol College*, as a reward for the exhibitioners making uſe of the college library. Perhaps without ſome advantage to the College, it might be difficult to prevail with the College to accept of ſuch a by-foundation as this to entertain ſix or more members who had received their firſt education for two or three years in a *Scotch* univerſity, and, at the time of the decree pronounced, differing from the principles of *Baliol College*, the one owning epiſcopacy, and the other preſbytery; and *Baliol College* might be right in inſiſting upon ſome advantages to themſelves: nor is this diſagreeable to the will; for *Mr. Snell* has given his eſtate to the charity at the direction of the vice-chancellor and ſeveral heads of houſes in ſuch univerſity, and in ſuch manner and proportion as they, or any three of them, ſhould appoint; and they appointed the ſurplus profits to be applied as above.

As to the going into the general account, I would not ſuffer a retroſpect without the allowance and aſſent of *Baliol College*, although there was more reaſon to complain than appears in the preſent caſe; and as to ſuch general account backwards, there is a difference between a College and natural perſons, for a College is a various

Account. Colleges not obliged to account ſo ſtrictly and ſo far back as common perſons are.

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various fluctuating body, who receive their revenues for their daily maintenance and ſupport, to eat, and drink, and maintain the College. The money is uſed, and the perſons who ſo applied it are perhaps dead; and I ſhall not ſuffer *Glaſgow* to call any money out of their hands for ſo far back as they have acquieſced under their proceedings, for above forty years.

College made a leaſe, the rent ſubject to taxes; the tenant by miſtake did not deduct them; equity will not allow him thoſe already paid, nor decree the account back.

I remember LORD MACCLESFIELD's taking ſuch diſtinction. A College before the reſtraining ſtatutes had made a very long leaſe upon a reſerved rent, and the College was to pay the taxes; the tenant, by miſtake, had paid them for a great many years, without deducting them from his rent, and thereupon brought his bill to have an account of them, and an allowance of them from the Revolution, which was a good many years back. LORD MACCLESFIELD was clearly of opinion, that the taxes were to be deducted out of the rent, and decreed that the tenant might deduct them for the future, but would not make an allowance backward, but refuſed directing the account, becauſe the College had lived upon their whole revenue, and the money was ſpent upon the repairs or other neceſſary demands of the College. Therefore, as to this part of the caſe, I am of opinion, that from the time of making to the filing the information the account muſt be upon the foot of the decree. But I am of opinion, that if the exhibitions have not been filled up, the money that ſhould have been applied for that purpoſe ſhall not go to the benefit of the College of *Baliol* as a ſurplus; though I ſhould not take notice of any ſmall vacancy, as for a month or two.

The other relief prayed is for the regulation of the charity. It ſeems the charity eſtate is much increaſed in value; therefore all parties may propoſe ſchemes to the Maſter, and then it will come more maturely before the Court.

As to the other ſet of defendants, who are the repreſentatives of *Mr. Spinks*, there are two ſorts of relief prayed againſt them. The firſt is, entirely to ſet aſide the leaſe now in being at three hundred pounds a-year clear rent, and for a fine of fifty pounds, with a clauſe in the original leaſe for nine ſucceſſive renewals at the end of every ſeven years, the fine to be each time; ſo that the leaſe would not expire till 1777.

The laſt relief prayed is, that if the relators cannot prevail to ſet aſide the leaſe entirely, then to be relieved againſt the clauſes of renewal at leaſt, and to have the leaſe ſet aſide ſo far, and the covenants for renewal expunged.

As to the firſt point, of entirely ſetting aſide the leaſe, there is no ſufficient ground for that, and it would be a cruel caſe to do it. The reaſons alledged for doing ſo are, firſt, that the leaſe is contrary to the will; and, ſecondly, to the decree. As to its being contrary to the will, that has not eſtabliſhed any particular manner of leaſing, but the truſtees were, to be ſure, obliged to leaſe it moſt beneficially

for

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for the charity. The decree, indeed, directs a particular method of leaſing, at a rent of three hundred pounds a-year, clear of taxes, and for as large fines as could be got, and for a term of twenty-one years. The firſt leaſe was a clear rent of three hundred pounds for twenty-one years, and the fine five hundred pounds, with a perpetual covenant of renewal. That leaſe went doubtleſs too far, and was not warranted by decree; but afterwards the College of *Baliol* and the truſtees thought fit to reduce that covenant to one for nine renewals at the end of every ſeven years; and thoſe are granted upon a recital of large improvements begun to be made and continued by the leſſees. As to the ſetting aſide this leaſe entirely, it muſt be admitted the leſſees had notice of both the will and decree. The decree is recited in the leaſe, and that recites the will, and ſo there is complete notice of both. But the leſſees have a good legal eſtate. The conſideration might have been different if they had had only a defective one at law, ſo that the truſtees could recover at law, and turn the leſſees into equity to eſtabliſh the leaſe, by having the defect ſupplied; and there perhaps the Court would not do it; but the leſſees having a good title at law, they have no need to be ſuitors to this Court, but inſtead of them the truſtees muſt be obliged to come into this court to be relieved againſt this leaſe; but that muſt be upon equitable terms; and though the Court would do equity in ſetting aſide this leaſe in favour of the charity, yet it will not decree cruelties againſt the leſſees. Suppoſe the leſſees took this eſtate, and the truſtees granted it for the ſake of great improvements upon it, which is the leaſe, though there is no evidence from the leaſe of the preciſe ſum or terms impoſed, yet there is proof that the leſſee has laid out above four thouſand pounds, and incloſed a deal of common unprofitable, inſomuch that the value of annual income is increaſed from five ſhillings to be worth ſeven ſhillings an acre, which is an exceeding meritorious conſideration, and ought not to go totally to the benefit of the charity. On the part of the repreſentatives of *Mr. Spinks*, the leſſee, it is objected, that the univerſity of *Glaſgow* ought not to be relieved againſt this leaſe, becauſe they ſtood by and ſuffered the leſſees to make theſe improvements upon the charity eſtate without diſcovering their title; and that this was like the caſe where a man ſuffers another to build upon his land, and ſtands by, and makes no objections, or ſhews his own title: and there have been ſome few caſes adjudged upon that point; and the maxim in ſuch caſes is, *Solum cedet ædificio.* But that is not the preſent caſe; for thoſe decrees have been where a man builds upon another's lands, having no title; but here the improvers had title at law, and were leſſees of the eſtate; and the landlord was not obliged to give notice to the leſſees not to improve, and was guilty of no fault in omitting it, for the leſſees might improve as they pleaſed.

Equity makes a great difference where a man is plaintiff or defendant in that court.

If a leaſe or grant is good at law, equity will not ſet it aſide without allowing for laſting improvements.

If a man build upon another's land, having no title to it, and the owner is paſſive, and ſtands by without giving notice of his title, the builder ſhall have the land in equity; for there *ſolum cedet ædificio*; but ſuch builder muſt have no title or colour of title to build in ſuch caſes.

there, as leſſee, &c. has, for the landlord need not to give notice

But

If conveyance is ſet aſide for fraud, it was good at law, and the grantor was obliged to come into this court, he ſhall not be relieved without doing equity by allowing laſting improvements, &c.

So in the caſe of turning abſolute conveyances into ſecurities for the money advanced only.

But ſtill the queſtion recurs, To what relief the charity is intitled? *Mr. Spinks* muſt be allowed a reaſonable recompence for his improvements; and in caſe the five remaining renewals will amount to no more than a reaſonable ſatisfaction, he ought to have the benefit of them. The truſtees come here to ſet aſide this leaſe, which is good at law; and as they are obliged to be plaintiffs in this court, and can have redreſs at law, they muſt have relief upon equitable terms only: as, ſuppoſe a man comes here to ſet aſide a conveyance for fraud, if the grantee has made laſting improvements, the Court will do him juſtice, and let him have ſatisfaction for them. So there are many caſes where abſolute conveyances have been taken, and yet this Court, upon bills, has turned them into ſecurities for the money advanced only; and there the Court allows for laſting improvements, and will not let the other party run away with the expence out of another's pocket: and this is always the caſe where a party has no remedy at law, but is obliged to come for relief here.

Therefore I SHALL DIRECT, that the Maſter enquire what laſting improvements have been made and money laid out, and how much the annual value of the charity has been increaſed by the leſſees; and to enquire, what was the juſt and real value of the leaſe when firſt granted in 1694 to be then purchaſed, conſideration being had to the continuance and renewals; and then, when this is ſtated, it will appear whether the leſſees have had ſufficient ſatisfaction or not; for the Court will take care that they have juſtice done them.

Caſe 140.

Bedford *againſt* Gibſon.

Michaelmas Term, 17. *Geo.* 2.

In what caſes voluntary annuities charged upon the real eſtate ſhall be poſtponed in payment to debts due to the bond and ſimple contract creditor of the deceaſed grantor of ſuch annuities.

THE LATE *Duke of Wharton*, being a young nobleman of immenſe fortune and of a finiſhed taſte in polite learning, having a great affection for *Dr. Young*, in 1719, by grant, reciting, that the improvement of the polite arts and ſciences was of public utility, and that *Dr. Young* had made great progreſs and advances in them, in reward, therefore, for his endeavours, he granted him a rent-charge out of his eſtates of one hundred pounds a-year for his life, with an expreſs clauſe of diſtreſs. In 1721, *the Duke* veſts his eſtate in truſtees by ſale, &c. to pay all his debts. By another deed, reciting the former grant to *Dr. Young*, and that *the Duke* ſtood indebted to *Dr. Young* in two hundred and fifty pounds, and that *Dr. Young* did, ſome time ſince the former grant, at the inſtance and requeſt of *the Duke*, quit the place and ſervice of *my Lord Exeter*, and thereby loſt an annuity of one hundred pounds, and whereas *the Duke* was willing to make him ſome amends for ſuch loſs, he grants him a ſecond annuity or rent-charge of one hundred pounds more for his life out of his eſtate, with like power of diſtreſs. And it was in proof, that *Dr. Young* did live in the family of *my Lord*

Lord Exeter, and that he quitted it to go to the *Duke of Wharton*; and that this was the conſideration of this ſecond grant is under *the Duke*'s own hand and ſeal. In 1725, *the Duke* makes a ſecond general deed of truſt of the ſurplus that ſhould be in the hands of the firſt truſtees, in order to pay all his juſt debts.

THE QUESTION was, Whether both or either of thoſe annuities to *Dr. Young*, being charges out of and affecting the land, ſhould be preferred to the bond or ſimple contract creditors of *the Duke* for valuable conſideration? or, Whether they or either of them ſhould be poſtponed to ſuch bond or ſimple contract creditors for valuable conſideration?

MR. ATTORNEY GENERAL argued againſt *Dr. Young*, that indeed both his annuities ſhould be charges upon the ſurplus of *the Duke*'s eſtate in the hands of his repreſentatives; for though the annuities are voluntary, yet they ſhall not be ſet aſide by the grantor or his repreſentatives, unleſs for fraud; but notwithſtanding that, they ſhall be poſtponed to creditors for valuable conſideration: that this is like the caſe where a man dies indebted by bond and ſimple contract for valuable conſideration, and has alſo given voluntary bonds; though at law ſuch voluntary bonds ſhall be paid equally with the bonds for valuable conſideration, and ſhall be preferred to ſimple contract creditors for valuable conſideration, becauſe the courts of law do not enquire into the actual conſideration, but as it is a deed or ſpecialty under the hand and ſeal of the party, preſume the conſideration to be valuable, yet in this Court they ſhall be poſtponed even to ſimple contract creditors for valuable conſideration, upon this ground of equity, that a man muſt pay before he can give, and muſt be juſt before he will be permitted to be bountiful; and though they ſhall be poſtponed to real debts, yet they ſhall be charges upon the executors, if they have aſſets to pay them: and the law has been ſo held ever ſince the decree of my LORD HARCOURT, in the caſe of *Jones v. Powell (a)*. Which THE CHANCELLOR admitted.

But the firſt grant to *Dr. Young* is voluntary; for although it be true, that *Dr. Young* has made great improvements in the politer ſciences, and though they are of great uſe, yet that is no reaſon why a particular perſon ſhould pay him for this, and give a voluntary annuity in preference of his real creditors, for no particular conſideration moved to *the Duke* more than to any other perſon; and if ſuch grants as theſe ſhould prevail, real debts would never be paid, for inſolvent perſons would be always defrauding them by ſuch grants. The conſiderations of love or friendſhip to ſtrangers import a deed to be voluntary, though in the caſe of a child it is otherwiſe, becauſe his parent is bound to provide for him. That the ſecond grant is not much better. The conſiderations are not adequate to the annuity of one hundred pounds for life; for the loſs of the ſalary in *Lord Exeter*'s family was precarious, was to

(a) 1. Eq. Abr. 84. 143.

exiſt

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exiſt during liking, and at furtheſt would not be continued beyond the education of the young noblemen. That though this Court does not weigh conſiderations minutely, yet where conſiderations are very ſmall, they are badges of fraud; and there is a difference where a value can be ſet upon a conſideration and where not: as where a marriage is concerned, or a family-ſettlement to be made, one cannot ſtate or aſcertain the conſideration by ſaying, "You ſhall give ſo much or ſo much;" and there the Court will enter into the adequateneſs of the conſideration. In the preſent caſe the conſideration is not adequate, and therefore will relieve againſt this charge, and only let it ſtand as againſt the creditors for valuable conſideration as a ſecurity for two hundred and fifty pounds lent, and intereſt.

MR. SOLICITOR GENERAL, for *Dr. Young*. The queſtion is, Whether theſe deeds are void by the ſtatutes of *Elizabeth*? And the ſame determination will be in this court upon thoſe ſtatutes as there would be at law; for the reaſon why the queſtion comes here is, becauſe the fund appointed for payment of the creditors is veſted in truſtees. The poſtponing of voluntary bonds in this court to ſimple contract debts, where they are to be paid by executors or adminiſtrators out of legal aſſets, is not applicable to the preſent caſe; for theſe are not bonds, nor are they payable out of legal aſſets, but they are charges iſſuing out of real eſtates, for the payment of which there is a proviſion made by eſtates veſted in truſtees. And upon the ſtatutes of *Elizabeth* there will be two conſiderations: The firſt, What conſiderations they are which thoſe ſtatutes require in deeds to prevent their being fraudulent and void as to purchaſors and creditors for valuable conſideration: The laſt, Whether theſe deeds have ſuch conſiderations as will ſupport them.

It is by no means neceſſary, under theſe ſtatutes, that the conſideration of a deed muſt be money, nor that it muſt be ſuch a conſideration as will entitle the party to an *aſſumpſit* at law. And where the conſideration is *quid pro quo*, it is not neceſſary that the thing parted with ſhould be adequate to the thing given, as appears from 2. *Leo.* 70.

This caſe does not prove what it was cited for; though the Solicitor General ſaid, the ſecond jointure may double the value of the firſt; but this does not appear from the caſe. Neither the word "money" nor "voluntary" are uſed in the whole ſtatute, but the words go throughout to fraudulent and colluſive conveyances to defraud creditors. In *Lord Teynham's Caſe* (*a*), LORD HALE ſays, that in the conſtruction of the ſtatute of *Elizabeth* three things are to be conſidered, fraud, conſideration, and *bona fide*; and that *bona fide* is oppoſite to fraud; that though there be no money conſideration, yet it may be no fraudulent deed; and a

(*a*) 1. Mod. 119.

deed

deed may be voluntary, and yet not fraudulent. The latter reſolutions, I muſt own, are contrary to this laſt part.

That as to the ſecond point, Whether the conſideration ſupported the preſent deeds: As to the firſt deed, the grant is by no means unbecoming the *Duke of Wharton*, who was a young nobleman of great quality and vaſt eſtate, a great genius, had a tincture for letters, eſpecially polite literature, wrote himſelf, had read much claſſical learning, deſirous of fame, and upon his coming into the world ambitious to be the patron of learning and learned men. It is ſaid, indeed, that as the conſideration of the firſt deed was *Dr. Young's* public performances, that could not raiſe a ſufficient meritorious conſideration to *the Duke*, becauſe every member of this kingdom received equal entertainment and benefit from ſuch performances as *the Duke* did. That may be untrue; and though the deed ſhall not prevail if any perſon rewards another for any labours which ſerve the public, yet if it engages him to ſpend his time in any branch to ſerve the public by the temptation of a ſalary, that will raiſe a valuable conſideration, ſo as to ſupport the deed, in the ſame manner as if he had engaged him to employ himſelf for the grantor's own private benefit.

HARDWICKE, *Lord Chancellor*. The queſtion is, Whether theſe annuities, or either of them, ought to prevail againſt the bond or ſimple contract creditors for valuable conſideration? Upon this there has been one original point mentioned at the Bar, which this caſe has been improperly compared to, and treated as though it was upon the ſame ground, which is this: The Court of late years has eſtabliſhed this rule to poſtpone voluntary bonds or debts to thoſe for valuable conſideration, and it has been adhered to ever ſince the creation of it by LORD HARCOURT, in that caſe of *Jones v. Powell*; and the rule is limited: as where a man owes debts by bond or ſimple contract for valuable conſideration, and afterwards gives voluntary bonds, and dies, the latter ſhall not only be poſtponed to the bonds, but even to the ſimple contracts for valuable conſideration, which ſhall be firſt paid out of the legal aſſets by the executor or adminiſtrator; but the voluntary bond is to be paid by the perſonal repreſentatives out of the ſurplus, if there remains any. But this rule has never been extended beyond that caſe of payment out of legal aſſets by an executor or adminiſtrator, and ſo does not come up to the preſent caſe; for theſe are not demands of debts out of legal aſſets, but of rent-charges granted by deed out of the land, and ſuch as at law affected the Duke's eſtate at the time when they were granted, for the firſt was granted conſiderably antecedent to the firſt deed of truſt, and was a charge upon the eſtate. As to the laſt, though it was granted after the Duke had parted with his eſtate to truſtees, yet he had an equitable eſtate in the ſurplus, and it was a charge upon that. So that I AM OF OPINION, that this is not a caſe within that rule of this court as to the adminiſtration of aſſets; for there, none of the creditors having a ſpecific lien upon the aſſets, they all ſtand in the ſame light. And this Court

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Court has a more extenſive power over them than in this caſe, where the annuities are ſpecific liens upon the land out of which they iſſue.

The true queſtion between the parties is upon the ſtatute of *Elizabeth*, Whether upon both or either of theſe deeds, which are grants of rent-charges, there are ſuch conſiderations as will ſupport them againſt ſubſequent creditors, or purchaſors for valuable conſideration? The two deeds will fall under different conſiderations.

The firſt deed is that of 1719, and the conſideration appears upon the face of it; which I agree is an honourable conſideration. It has generoſity, it has everything in it which becomes a great man: but I ſhould go much farther than this Court ever has done to ſay it is ſuch a valuable conſideration as the ſtatute intended. If the conſideration had been, that *Dr. Young* had been invited by *the Duke* to inſtruct him, although of full age, yet if *the Duke* had received inſtructions, and *the Doctor* ſpent his time, even his company would have been ſufficient upon the ſtatute of *Elizabeth* to have ſupported the deed againſt the creditors; for whether a man gives his money, his learning, or his time, it is a ſufficient conſideration; but nothing at all of that ſort is proved, nor does it appear upon the deed, for that is general, for the love which he had for *Dr. Young*'s great abilities and improvements in the politer arts. And the conſideration had been as meritorious if he had granted an annuity to him in conſideration of his great learning, or of his being a relation to him, or of blood; all which are honourable conſiderations; but they are not ſuch as will prevail againſt creditors or purchaſors upon the foot of that ſtatute. Suppoſing then this deed to be voluntary, yet the Counſel ſay it is not void by the ſtatute, becauſe it is not fraudulent. That might have been ſo held formerly, but the later reſolutions are all to the contrary; for it is now a ſufficient reaſon to ſet aſide deeds or grants in favour of creditors and purchaſors becauſe they are voluntary, without any proof of fraud, for the preſumption amounts to proof; and though voluntary gifts or charges have been created, yet they ſhall not ſtand in the way of future creditors, although they have expreſs notice of ſuch gift before their purchaſe, mortgage, &c.

Eq. Abr. 334. pl. 6.

The Counſel for *Dr. Young* have recourſe to another point to preſerve the firſt deed, and ſay, that although the conſiderations expreſſed upon the face of the deed are voluntary, yet there was an extrinſic conſideration, which is a valuable one, although it is not expreſſed upon the deed; and they have entered into proof of it; and that is, his leaving *Lord Exeter*'s family, and the proviſion of one hundred pounds a-year made for him there, to come and live with *the Duke of Wharton*. But as to this part of the caſe, it is in the firſt place doubtful, whether this proof can be let in upon this deed; and, in the next place, it is clear, that the proof does not bring this fact to be the conſideration of this grant. As to the

admiſſion

admiſſion of this proof, the deed has an expreſs conſideration, *viz.* "the improvements *Dr. Young* had made in the polite letters;" and the deed does not add, "for other good cauſes and conſider-"ations:" and the general rule is, that where expreſs conſiderations are mentioned in a deed, and no general words, "as for "divers other good cauſes and conſiderations," there no proof can be admitted of any extrinſic conſideration, although it may be conſiſtent with the expreſs conſideration of the deed. But ſuppoſe this proof could be entertained, yet the proof will not avail *Dr. Young*; for though *Mr. Carew*, who is the only witneſs upon it, eſtabliſhes the fact that *Dr. Young* lived at *Lord Exeter*'s, and had an annuity of one hundred pounds, and that he left that family to come and live with *the Duke*, yet he does not prove that that fact was the conſideration of this grant to *Dr. Young*. And upon the whole I AM OF OPINION, that this firſt grant can by no means be eſtabliſhed againſt the creditors of the *Duke of Wharton*, although they became ſo ſubſequent to the grant. But

As to the ſecond grant I AM OF OPINION, that there appears a ſufficient conſideration to ſupport it upon the ſtatute of *Elizabeth* againſt *the Duke*'s creditors; and that conſideration is ſufficiently proved and eſtabliſhed; for this recites the former annuity, and that the *Duke of Wharton* ſtood indebted to *Dr. Young* in the ſum of two hundred and fifty pounds (being the arrears of the former annuity), and that *Dr. Young* did ſome time ſince, at his inſtance and requeſt, quit and leave the place and ſervice of *my Lord Exeter*, and thereby loſt an annuity of one hundred pounds; and whereas he was willing to make him ſome amends, he gives him a further annuity, in conſideration of the two hundred and fifty pounds, and of his quitting the *Lord Exeter*'s ſervice. This conſideration is ſufficiently proved; for *Mr. Carew* proves, that *Dr. Young* lived with *Lord Exeter*, and had ſuch annuity there, and quitted it to go to the *Duke of Wharton*; and that that was the conſideration of this ſecond grant appears under the hand and ſeal of *the Duke*. Now this conſideration is ſufficient upon the ſtatute of *Elizabeth*, for here is a loſs on one ſide and an advantage on the other: and this ſecond deed reciting that this annuity was granted as a compenſation for the loſs of *Lord Exeter* s ſervice, excludes the preſumption of the other annuity's being granted upon that conſideration; for if it had, it would have ſaid the ſecond annuity was as a further or additional compenſation. And this Court will not weigh conſiderations in very nice ſcales; for upon the ſtatute it is ſufficient if it be good and fair, though not an equivalent to the thing granted. AND I AM OF OPINION in the preſent caſe, that the arrears of two hundred and fifty pounds upon the firſt annuity would be a valuable conſideration for the grant of a ſecond; for the voluntary annuity was good againſt himſelf, and he might be laid in priſon for the arrears, or his lands diſtrained upon for them; though the decree would perhaps be otherwiſe upon the adminiſtration of legal aſſets in the hands of an executor or adminiſtrator, for there a voluntary bond ſhall be poſtponed to ſimple contract creditors for valuable

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consideration. Suppose a man give a voluntary bond to pay money in two or three months, and the time expires, whereby the obligor is liable to be thrown into prison, and afterwards gives a new bond for the money, and has the old one delivered up, this new one cannot be called a voluntary bond, and yet if it is not to be performed as well as the former voluntary bond, it would annul all debts for valuable consideration; for the party need only to double-hatch his debt, and then it is secured to him effectually. But the present case differs, as I have said, from the rules observed in the administration of assets; for here it is a grant or charge out of a real fee-simple estate. THEREFORE I AM OF OPINION, that the first deed will not prevail against either the bond or simple contract creditors for valuable consideration, but that the latter shall take place of both; and that the former shall be paid out of the surplus in the hands of *the Duke*'s representatives, if any remains.

Case 141.

Ex parte Turner.

Lincoln's-Inn Hall, Michaelmas Term, 18. Geo. 2. in the Matter of HANNAFORD, *a Bankrupt.*

In what cases the court of chancery will not order a bankrupt's estate to be sold.

JOHN MICKLEMORE devised all his estate to a trustee and his heirs, subject to the payment of all his just debts. The trustee was indebted to *Turner*, the petitioner, in one hundred and seventy pounds by bond on his own account, and after the death of his testator borrowed two hundred pounds more to pay some of his testator's debts, and then made a mortgage of the trust estate to *Turner* for the whole sum of three hundred and seventy pounds, which is recited to have been lent to pay the testator's debts, whose will is recited in the mortgage. The trustee after this becomes a bankrupt, and *Turner* proved his debt before the commissioners.

Turner now petitions THE CHANCELLOR that the mortgaged premises may be sold for his benefit; but the creditors of *Micklemore*, the testator, oppose it, insisting, that as the mortgaged estate was devised for the payment of debts generally owing by the testator, they, upon the foot of the trust, ought to have an equal share with the petitioner, the mortgagee; and that if he lent money for the payment of the testator's debts, as he had notice of the trust in the will he ought to have seen the money applied.

Viner, "Purchasor," 119, 120, 121, 122, 123. Eq. Abr. 358, 359. 2. Ch. Cas. 115. 1. Vern. 302. 2. Vern. 5. Barn. Ch. Rep. 79, 80, 81. Elliot v. Merryman.

HARDWICKE, *Lord Chancellor*. Where a devise is general, "in trust," or "subject to pay debts," the devisee may sell or mortgage, but he must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer; for in cases of these general devises, he is not obliged to see to the application of the money he advances. But even in this case inconveniencies often arise; for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally and *pari passu*. However, if the trustee prefer one creditor to another where he

he ought not, the remedy uſually is againſt the truſtee, and not the lender of the money; for if the latter was to ſee the application of his money upon ſo general a truſt, he could not ſafely advance his money without a decree in this court. But where the lender has been favoured in this ſort, as not to be obliged to ſee the application of the money he advances, it has only extended to thoſe caſes where he has advanced it on the account of the deviſor's debts only; but here he has advanced money to pay the truſtee's own debts. As therefore it appears that the mortgagee had notice of the truſt, for it is recited in the very ſecurity to him, and knew that part of the debts were the debts of another perſon, and not of the deviſor, he has not ſuch an equity as will entitle him to relief. And in all caſes where a mortgagee is intitled to relief in this ſummary way of petition, it is where the eſtate is clearly and properly the bankrupt's own, and not another perſon's, or ſubject to a truſt.

Ex parte TURNER.

I muſt therefore diſmiſs the petition, but without prejudice to any claim the petitioner may have, either at law or equity, on the eſtate.

Selwyn *againſt* Honeywood, *et contra*. Caſe 142.

In Chancery, January 16, 1744, *Lincoln's Inn Hall.*

SIR ROBERT HONEYWOOD, the defendant's father, being concerned in ſeveral public commiſſions abroad, and being a great ſufferer thereby, preſented a memorial to the late king to that effect: whereupon his majeſty ſignified to *Mr. Hawes*, the then receiver-general of the cuſtoms, to pay to *Sir Robert Honeywood*, during his office, the clear yearly ſum of eight hundred pounds out of the profits of his office. *Mr. Hawes* was afterwards removed, and the plaintiff, *Mr. Selwyn*, made receiver-general in his ſtead; and the late king ſignified the like pleaſure to him: whereupon *Mr. Selwyn* gave a bond to the defendant, *Mr. Honeywood*, in the penalty of ten thouſand pounds, in truſt for his father *Sir Robert Honeywood*, the condition of which was, that *Mr. Selwyn* would pay to *Sir Robert*, the father, the yearly ſum of eight hundred pounds, ſo long as he ſhould enjoy the ſaid office, *or any other in truſt for him or for his benefit*. *Mr. Selwyn* made theſe payments regularly down to 1727; at which time he was removed from his office, and his brother *Henry Selwyn* ſucceeded him, and continued in the office till 1733, when *Mr. Eckerſhall* was appointed in his room, and is now in poſſeſſion of the receiver-generalſhip.

A defendant is not obliged to diſcloſe any fact which would tend to ſubject him to a corporal puniſhment or a pecuniary penalty, or endanger a loſs of office.

Mr. Honeywood the truſtee brought his action upon the bond, and *Mr. Selwyn* the defendant brought his bill for an injunction to the proceedings at law till the hearing of the cauſe in this court be obtained; and in the ſame bill he prayed to be relieved againſt this bond. *Mr. Honeywood* brought a croſs-bill to have ſatisfaction for all arrears of the annuity down from 1727 to the filing the bill, praying a diſcovery whether *Mr. Selwyn* during his time was any

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more than a truſtee, and whether he himſelf had not the benefit of the office; and alſo, whether *Mr. Eckerſhall* is now any more than a nominal receiver; and whether he does account for the profits to *Mr. Selwyn*, who has not come to an agreement to allow him a ſalary for his trouble: and then inſiſts, that the annuity ſtill ought to be paid by the plain intention of the bond, *Mr. Selwyn* having the real benefit of the office. *Mr. Selwyn* by anſwer ſwears, that his brother had the office in his own right; but as to *Mr. Eckerſhall* inſiſts, that the diſcovery prayed would ſubject him to the penalties of one or more acts of parliament; that he has heard, and believes, that *Mr. Eckerſhall* has enjoyed the ſaid office ever ſince it has been granted to him; that the defendant, *Mr. Selwyn*, is a member in the preſent parliament, and was a member during all the laſt parliament, and was ſo before the office was granted to *Mr. Eckerſhall*; that as he was a member of both parliaments, and as the bond has been fully performed by his paying the annuity as long as he had the office, he inſiſts, that he is not obliged to diſcover whether *Eckerſhall* receives the profits of the office for the uſe or benefit of the defendant, or whether he has come to an agreement with *Eckerſhall* about the profits of the ſaid office. The plaintiff in the croſs-cauſe had this anſwer referred for inſufficiency; THE MASTER reported it to be ſo; and now, upon exceptions to the Maſter's report, it came on to be argued.

MR. ATTORNEY-GENERAL *in favour of the anſwer*, and againſt the right of a diſcovery, inſiſted, that as the plaintiff prays to diſcover whether the defendant has not the truſt or beneficial intereſt in this office; and as the defendant is a member of parliament, and ought not to have any office relating to the receipt of the king's cuſtoms held by anybody in truſt for him, it being prohibited by ſeveral acts of parliament; that he ſhould not be compelled to make any ſuch diſcovery, becauſe it might ſubject him to the confeſſion of a breach of an act of parliament: that the tenderneſs of the *Engliſh* laws obliges no man to confeſs from his own mouth ſuch facts as would charge him either with a forfeiture or a penalty: and this rule receives great ſanction in this court, for fear of perjury; for a man's intereſt might, in many caſes, oblige him to forſwear himſelf rather than make diſcoveries prejudicial to himſelf. And he cited ſeveral caſes to eſtabliſh this general rule: as *Munn v. Stevens*, before the preſent Chancellor. The bill was brought by the aſſignees of a bankrupt againſt *Stevens* and ſeveral others, charging them with uſury; that they had lent ſeveral ſums of money to the bankrupt, and had taken ten pounds *per cent.* intereſt; the defendant anſwered every part of the bill, and denied the uſury; and your Lordſhip decreed an account of what the defendants had received: but it was objected, that if the defendants were bound to anſwer generally upon taking the account, they might be obliged to anſwer things which would charge them with uſury: and your Lordſhip was ſo tender as to direct, that upon their examinations

examinations upon interrogatories that account ſo directed ſhould not prevent them from inſiſting that they ought to diſcover nothing, nor anſwer any interrogatory which tended to charge them with uſury. The caſe of *Champernoon v. Totneſs* (*a*), alſo before the preſent Chancellor. This bill was brought againſt the corporation of *Totneſs*, and charged, that the Corporation having been guilty of a treſpaſs and nuſance in ſtopping the watercourſe of the plaintiff's father, that the father had promiſed to forgive the treſpaſs, and alſo to let the ſtoppage continue, upon a promiſe from the Corporation to vote for him at the enſuing election; and the bill prayed a diſcovery, whether ſuch a promiſe was not made, and whether it was performed; the defendants demurred to the bill, as praying a diſcovery from the defendants of a thing that was contrary to law, and which they ought not to do, and which if diſcovered would ſubject them to proſecution; and your Lordſhip was of that opinion, and held the demurrer good. The caſe of *Wrotteſley v. Bendiſh* (*b*), alſo before the preſent Chancellor. An eſtate was given to *Mrs. Bendiſh* during widowhood; but in caſe ſhe married, then it was to go over to *A.* who brought his bill againſt her to diſcover whether ſhe was not married; ſhe anſwered part of that queſtion; and upon exceptions to her anſwer your Lordſhip ordered, that ſhe ſhould not be obliged to anſwer this charge, which would ſubject her, if true, to the forfeiture of her eſtate. That the preſent caſe is much ſtronger than any of thoſe, becauſe it is praying the diſcovery of a fact which, if true, would make the defendant a tranſgreſſor of thoſe acts of parliament which very nearly concern the public weal, attended with that great penalty of forfeiting his ſeat in parliament during that ſeſſions.

MR. SOLICITOR-GENERAL *on the ſame ſide* argued, that this Court will not act like an inquiſition to oblige parties to make ſuch diſcoveries as will ſubject them to penalties: and the queſtion is, Whether the defendant will not ſubject himſelf, as a member of parliament, to ſeveral penalties and incapacities if he is obliged to anſwer to the diſcovery prayed by the plaintiff? It is ſuggeſted, that *Mr. Selwyn* procured this office for *Mr. Eckerſhall*, and that he is no more than a truſtee for him. This is a breach, in the firſt place, of the ſtatute 5. & 6. *Edw.* 6. c. 16. againſt buying and ſelling of offices, which has very general words. This is an office concerning the receipt of his majeſty's cuſtoms or revenue; and it is charged, that the defendant has procured this deputation or office for *Mr. Eckerſhall*, who is only to have a ſalary, and *Mr. Selwyn* to have the profits; and it is a ſelling within this ſtatute if a man procure an office for another, either for a groſs ſum, or by reſerving the profits, or part of them, annually out of the office. Indeed, in the caſe of *Beliamy v. Burrow* (*c*) it was decreed, that the office of the clerk of the crown might be granted to one in truſt to pay the profits to another.

(*a*) 2. Atk. 112.
(*b*) 3. Peer. Wms. 237.
(*c*) Caſes Temp. Talb. 97.

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HARDWICKE, *Lord Chancellor.* I do not know whether I ſhould have determined that caſe ſo far; I ſhould have had great difficulties about it if it had come before me.

MURRAY, *Solicitor General.* There are two other ſtatutes, in one of which this caſe falls directly, and is within the other by conſtruction. By the ſtatute 12. & 13. *Will.* 3. c. 10. ſect. 89, 90. it is enacted, "That no member of the houſe of commons ſhall be "capable of being a commiſſioner or farmer of the cuſtoms, or of "holding in his own name, or in the name of any other perſon in "truſt for him, or for his uſe or benefit, or of executing by himſelf "or his deputy, any office, place, or employment, touching the "farming, collecting, or managing of the cuſtoms;" and if he do ſo, he is declared to be "abſolutely incapable of ſitting, voting, or "acting, as a member of the houſe in ſuch parliament." The preſent is an office relating to the cuſtoms, and clearly within this ſtatute. And the defendant ſwears, that he was a member of the laſt, and alſo of the preſent ſeſſion of parliament; ſo that if he is to diſcover that this office is in truſt for him, he will be rendered incapable of ſitting in parliament, and is beſides liable to an information or indictment for a breach of this ſtatute; for wherever a ſtatute prohibits a thing generally, as the preſent does in the eighty-ninth ſection, and gives no remedy againſt the tranſgreſſion, the law raiſes by conſtruction the puniſhment to be by information or indictment; ſo that the Court will not oblige him to anſwer to what would ſubject him either to a criminal proſecution or to the loſs of his ſeat in parliament, for the latter is to be conſidered as an incapacity in the nature of a penalty; and cited the caſe of *Reade v. Smith*, before LORD HARDWICKE, in chancery. There was a bill brought againſt *Reade* to diſcover whether an eſtate did not come to him by diſcent from his father, and whether his father did not purchaſe it, being a papiſt; the defendant pleaded, that he was not obliged to diſcover; and there your Lordſhip was of opinion, that he was not obliged to diſcover whether he claimed from a purchaſor who was a papiſt; for though the act of parliament do not lay a penalty upon a papiſt who purchaſes, yet it prohibits him from taking by purchaſe; which prohibition raiſes an incapacity in the nature of a penalty, as it takes from him that liberty of purchaſing which every other ſubject has. By the 1. *Geo.* 1. c. 56. to incapacitate members of the houſe of commons from enjoying penſions from the crown, it is enacted, "That if any perſon ſhall "have or accept any penſion in his own name, or in the name of "any other perſon in truſt for him, he ſhall be incapable of being "a member of ſuch houſe or any other; and if ſuch perſon ſhall, "after accepting a penſion, preſume to vote or ſit in ſuch houſe, "he ſhall forfeit twenty pounds a-day for ſo doing, to any perſon "who will ſue for the ſame." The preſent is not a penſion ſtrictly; yet it may be a queſtion whether it is not ſo by conſtruction; for if the crown give this office to *Mr. Eckerſhall* under a ſecret truſt to give ſo much to *Mr. Selwyn*, a member of parliament, yearly out of it,

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it, this may be within the intention of the ſtatute, for it ſeems to be equally miſchievous whether the money is to be received from the exchequer immediately, or from an officer during pleaſure, who receives his office upon that condition, and may be turned out as ſoon as he refuſes to pay ſuch yearly ſtipend. If ſo, *Mr. Selwyn* ſhall not be obliged to diſcover what will ſubject him to a pen lty of twenty pounds a-day for ſo long as he ſhall ſit in the houſe. But there is no occaſion to ſay this is a penſion within this ſtatute, becauſe the defendant's equity is ſtrong enough upon the former act of parliament of the 12. & 13. *Will.* 3. c. 10. ſ. 89, 90.

MR. BROWNE *on the other ſide*, that the defendant ſhall be obliged to diſcover; for he is not brought into this court by *Mr. Honeywood*, but *Selwyn* is plaintiff in the original cauſe, and brought *Mr. Honeywood* into this court, in order to be relieved againſt a legal remedy; and if he aſk favours here, he muſt receive them upon equitable terms, which are, to make an open diſcovery of the truth of the caſe; and it is different from thoſe where a man is made a defendant, and brought adverſarily into equity, for there the Court will adhere ſtrictly to its rules, and will not oblige a diſcovery. But to conſider this caſe upon the general rules of the court, which are, that a defendant ſhall not be compelled to make diſcovery of ſuch facts as would either ſubject him to criminal proſecutions or to loſs of property by way of forfeiture or penalty. But this caſe will not fall under thoſe general rules, for by this diſcovery prayed he will neither ſubject himſelf to the loſs of property or to a criminal proſecution, but only to a loſs of his ſeat in parliament, which is not a pecuniary loſs, nor a place of profit, but of ſervice; and if the defendant is not to anſwer the diſcovery prayed, he may elude by his own act his own contract, and ſcreen himſelf from the penalty of his bond. This agreement to pay eight hundred pounds a-year out of the office was before his ſitting in parliament; and his becoming a member is his own act; and if he has reſigned his office to another in truſt for himſelf, if he is not obliged to diſcover whether he has done ſo, he has defeated his own agreement, and preſerved himſelf from the penalty of his bond; for perhaps this truſt may be proved no otherwiſe than by the defendant's own oath. And to prove that the defendant upon this foundation was bound to make a diſcovery, he cited the caſe of *Gaſkyn v. Sydwell* (*a*), before LORD TALBOT: The defendant was the repreſentative of *Sir Robert Nightingale*, an *Eaſt-India* director: it ſeems, that *Sir Robert* had entered into an agreement with ſeveral others to carry on an illicit trade to the *Eaſt-Indies*; and upon a bill brought by one of the partners againſt the other for an account, it was pleaded by them, that they were not obliged to make a diſcovery of the agreement, becauſe it would make them liable to the penalties of ſeveral acts of parliament made in order to ſecure an excluſive trade to the *Eaſt India Company*; but this plea was over-ruled upon two reaſons; the one, that it was informally pleaded; the

(*a*) Rep. in Eq. 186. 2 Eq. Abr. 72. 171.

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other, that when perſons entered into ſuch agreements, they virtually waived the penalties of thoſe ſeveral ſtatutes; that ſuch plea was in its nature contrary to the agreement itſelf, and if it were to be allowed, would be a means to elude and deſtroy the contract of the parties. That all the caſes cited are where the diſcovery would occaſion a loſs of property: as in the caſe of uſury, the ſecurity would be avoided by ſuch diſcovery, and the money loſt: ſo in the caſe of marriage, the diſcovery would have occaſioned the eſtate to have gone from the party; but here the diſcovery would only occaſion the loſs, at moſt, of an honorary office, or a place of truſt or ſervice: and the rule has never been carried ſo far.

The laſt reaſon upon which the plaintiff is entitled to a diſcovery is this: The bill prays a payment of this annuity during all the laſt ſeſſion of parliament, and for part of the preſent: and as the ſtatute of *William the Third* only diſables the perſon from ſitting in parliament during that ſeſſions, the forfeiture ſuggeſted is at an end; and ſo the defendant may at leaſt diſcover what was the nature of the caſe during the laſt ſeſſions; he may make diſcovery of that without any danger, the ſeſſions being paſſed.

HARDWICKE, *Lord Chancellor.* One part of the defendant's anſwer is, that he is not obliged to make a diſcovery, becauſe he has performed the bond. This is explained at the Bar to be thus: The bond is for payment of eight hundred pounds yearly during ſuch time as *Colonel Selwyn*, or any perſon in truſt for him, ſhall be in poſſeſſion of the office. Now it is inſiſted, that here being a period of time ſince the bond in which *Mr. Selwyn* ceaſed to have an intereſt in the office during his brother's enjoyment of it to his own uſe, therefore, according to the conſtruction of the condition, if there was any ceſſation of *Colonel Selwyn*'s having the office the bond was fulfilled and expired, and would not revive, becauſe it was only relative to the continuance of the office without interruption; and therefore, as the bond is performed, he ought not to make a diſcovery, becauſe it would be a vain thing; and if it was clear that the bond was at an end, there would be no occaſion for a diſcovery; and the Court would not compel a nugatory thing. But here the caſe is doubtful; and if it ſtood upon this point, I would oblige a diſcovery to prevent the plaintiff's loſs in caſe of *Colonel Selwyn*'s death; and it might be a nice queſtion upon the foot of colluſion, to prevent the parties having advantage of the bond. The other and material part of the defence is, that he is not obliged to make diſcovery, for fear of ſubjecting himſelf to ſeveral penalties. The queſtion is not now before me to puniſh parties for breaches of an act of parliament, or for enforcing an act of parliament which ought to be ſtrictly and ſacredly obſerved; for that is the buſineſs of the parliament, or of the Judges, if an indictment will lie upon it. The houſe of commons is the proper place to enforce a diſcovery of this ſort, and not for this Court from the parties own mouths, any otherwiſe than ſuch diſcovery relates to perſons who claim rights to or out of ſuch office. And THE QUESTION in the preſent

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preſent caſe is, Whether the plaintiff has a right to this diſcovery? It is an eſtabliſhed rule, that no man is obliged, in a court of equity, to diſcover matters which may ſubject himſelf, or tend to ſubject himſelf, to any penalty, whether it be loſs of property or office, or which may ſubject himſelf to any puniſhment of another ſort; for in ſuch caſes the defendant may either plead againſt ſuch diſcovery, or inſiſt upon it by way of anſwer. And the conſideration is, whether this caſe is within that rule. Here are two acts of parliament, for I ſhall lay the Penſion Act of the 1. *Geo.* 1. c. 56. out of the caſe, within which, it is ſaid, the defendant would be brought under incapacities by thoſe ſtatutes, if he was to make the diſcovery prayed for. The firſt ſtatute is the 5. & 6. *Edw.* 6 c. 16. relating to the ſale of offices. And it is inſiſted upon, that it is contrary to that act of parliament for any perſon to accept of an office, or to have an office upon terms of paying either a certain ſum of money or the profits of that office to another, becauſe ſuch contract is in the nature of a conſideration given for the having or obtaining ſuch office. But whatever the law might be upon this point, I think *Mr. Selwyn*, the defendant, cannot enter into that conſideration, though that ſhould be the conſtruction, for *Mr. Selwyn* is not the officer, but *Mr. Eckerſhall.* If a bill was brought againſt *Mr. Eckerſhall* to diſcover whether he held that office in truſt or by contract to pay over the profits or part of them, or a groſs yearly ſum, he might well inſiſt upon it that that would be to make a diſcovery tending to the forfeiture of his office. But *Mr. Selwyn* cannot inſiſt upon that act of parliament; for the only ſtatute he can inſiſt upon is, the 12. & 13. *Will.* 3. c. 10. ſ. 89, 90. in which it is enacted, "That no member of the houſe of commons ſhall be "capable of holding, in his own name, or in the name of any other "perſon in truſt for him, or for his uſe or benefit, or of executing "by himſelf or deputy, any office in the cuſtoms; and if he does "ſo, he is declared to be incapable of ſitting as a member in that "parliament." It is inſiſted, that this diſcovery would ſubject the defendant to this penalty of the loſs of his ſeat in parliament for that ſeſſions. The plaintiffs agree to the general rule, that a defendant ſhall not diſcover what ſhall directly charge himſelf with a penalty, or with evidence of it. But they argue, that the defendant is not within the rule for three reaſons: FIRST, That though the rule be true upon common caſes of bills, yet this differs from it, the diſcovery being prayed upon a croſs-bill, &c. SECONDLY, That the excluſion from a ſeat of parliament, being only a place of honour or ſervice and not of profit, is not ſuch a loſs of property, or ſuch a penalty, as will ſcreen the defendant from a diſcovery. THE THIRD reaſon is, that he may diſcover what relates to the ſeſſion which is paſt without any danger; for the excluſion from ſitting in parliament being only during that parliament, the forfeiture is expired with the ſeſſion. As to THE FIRST REASON, that does not differ the caſe at all, whether the diſcovery is prayed by original bill or croſs-bill; and I will clear this by a familiar inſtance: Suppoſe an original bill is brought for a ſpecific performance of articles between

two

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two parties, and then the defendant brings a croſs-bill to be relieved againſt the ſaid agreement, and for a diſcovery ſhould charge matters to ſhew that the agreement was corrupt, and againſt the ſtatute of Uſury, the defendant in the croſs-bill might inſiſt by his anſwer, that he was not obliged to anſwer ſuch bill. This brings me to the merits of the queſtion, and to THE SECOND REASON given, that this is not ſuch a diſcovery as will ſubject the defendant to what is properly a puniſhment or penalty; and they define thoſe to be a loſs of eſtate or property, or ſome office that is beneficial and profitable, or ſome corporal puniſhment; that the loſs of a ſeat in parliament is not puniſhment, nor ſuch a loſs of property as is within the rule, for a ſeat in parliament is not an office of profit, though they admit it to be an office of ſervice, and of high truſt and honour. But I am of opinion, that an incapacity of ſitting in parliament is a puniſhment within that rule, for it is often inflicted as a puniſhment; and there are acts of parliament which inflict abſolute excluſions from parliament as puniſhments; which ſhews they are to be conſidered as ſuch, and inflicted as a puniſhment upon the violators of this very ſtatute 12. & 13. *Will.* 3. c. 10. I remember a caſe wherein the point was conteſted, that a ſeat in parliament was a ſervice, and not a privilege. The caſe I mean is that of *Aſhby v. White* (*a*), where the queſtion was, Whether an action would lie againſt the returning-officer for the refuſing to take the vote of a perſon qualified? and MR. HARLEY, *the Speaker* of the houſe of commons, oppoſed the lying of an action at law, becauſe the ſitting in parliament was a ſervice; and to be ſure it is ſo, it being to ſerve the crown in the great meeting of the nation; but it is alſo a ſervice attended with privileges, as many ſervices are. *The Duke of Buckingham*, who was beheaded in *Henry the Sixth*'s time for high treaſon, held ſix manors in *Glouceſterſhire*, by grand ſerjeanty, to execute the office of high-conſtable of *England*: this office is, as to the crown, a ſervice, but in all other reſpects attended with privileges, and of great dignity, and ſuch an office as the invaſion of it might be puniſhed by an action, and damages recovered. As to THE THIRD REASON to induce a diſcovery for at leaſt part of the time for which the annuity is granted, it is ſaid, that there have been two parliaments held in the period of time for which the annuity is payable. The grant of this office to *Mr. Eckerſhall* was in 1734, during the laſt parliament, which did not expire till 1741; that the penalty inflicted by the 12. & 13. *Will.* 3. c. 10. is from ſitting in that parliament, and therefore the defendant may without danger diſcover what was the nature of the grant of this office during the laſt parliament, which is expired; and if the defendant had not alſo ſet forth, that he is a member of the preſent parliament as well as of the laſt, I ſhould have thought him obliged to have made a diſcovery. But ſuppoſe I ſhould compel the defendant to make a diſcovery for the laſt parliament, and protect him from making any for the preſent, he will be obliged to ſet forth,

(*a*) 1 Salk. 19. 3. Salk. 17. 6. Mod. 45. 8. State Trials, 89. Holt, 524. 1. Brown's Caſes in Parliament, 45. Ray. Ent. 479.

whether

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whether *Mr. Eckerſhall*, at the time of taking the office, did not take it in truſt for the defendant, and whether he did not account for the profits to the defendant during the laſt parliament. That evidence would be ſufficient to prove, that the office is held in truſt for him even during the preſent parliament, whereby he would loſe his ſeat in the preſent parliament, and would plainly incur the penalty of the ſtatute of *William the Third* by his own confeſſion, which this Court will not oblige him to do; for ſuch confeſſion might be read againſt him in the houſe of commons, who would doubtleſs, upon that, exclude him from their houſe during this ſeſſions. And I ſhould alſo have the ſame thing inſiſted on at the hearing of this cauſe, that ſuch office was held in truſt for him even during this ſeſſions of parliament; and I ſhould take it to be ſufficient evidence; for if a man admit that an office was granted in truſt for him, and that it continued ſo for ſeven years, it will be very ſtrong proof that it is ſtill held in truſt for him. As to what has been ſaid, that an indictment will lie againſt *Mr. Selwyn* for a breach of this ſtatute, if it ſhould come out that this office is held in truſt for him, of this I am very doubtful; for the ſtatute is not, that no ſuch office ſhall be ſo granted: and though an indictment or information might lie againſt a member of parliament for accepting ſuch office in the cuſtoms, and exerciſing it, yet as *Mr. Selwyn* is only a *ceſtuy que truſt* of the office, I do not ſee what indictment or information can be framed upon it. Upon the whole I AM OF OPINION, that upon the foot of the ſtatute 12. & 13. *Will.* 3. c. 10. the defendant is not obliged to diſcover the fact prayed, nor evidence of the fact. The plaintiff may make proof by other perſons of the fact, but is not entitled to the defendant's confeſſion. Therefore ſuch exception to THE MASTER'S report muſt be allowed.

Wilkinſon *againſt* Sterne. Caſe 143.

If a perſon indebted by mortgage and bond pay money to his creditor generally, the creditor may apply it on diſcharge either of the mortgage or bond.

IN THIS CASE the defendant was indebted to the plaintiff's teſtator by mortgage and bond; and a diſpute ariſing about the payment of one hundred pounds by the defendant to the teſtator, whether it ſhould be applied to the diſcharge of one of the bonds, or only to pay the intereſt due upon the mortgage, the plaintiffs, before the Maſter, produced a pocket-book of the teſtator, in which he had entered a memorandum, about a fortnight after the receipt of the money, that it was in part of the intereſt due upon the mortgage. The Maſter admitted the book to be evidence of the application of the money. Whereupon the defendant excepted to the report, and inſiſted, that the book ought not to be received as evidence, eſpecially as the entry was not made at the time of the payment of the one hundred pounds: but at the ſame time he produced no evidence, beſides his own oath, that he paid the one hundred pounds in diſcharge of one of the bonds; and his Counſel cited the maxim, *Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis*; and

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and the caſe of *Manning v. Weſterne* (*a*), was cited on the other ſide.

HARDWICKE, *Lord Chancellor*. The diſtinction is this: Where a man is indebted by mortgage and bond, and pays money to his creditor, he muſt make the application, and declare to which debt he applies the money, at the very time he pays it, and he cannot make the application afterwards; but his creditor may make the application any time after a general payment by his debtor, ſo as he does it before an account ſettled between them: and there have been abundance of caſes upon this diſtinction. And I am clear, that the pocket-book of the plaintiff's teſtator is to be admitted as proper evidence; and there cannot be better evidence to that end; for it is not to prove the truth of the payment, for that is admitted on both ſides, but only to prove the application of the money; and as the teſtator, if he had been living, might apply it to which ſecurity he pleaſed, even now, ſo undoubtedly his hand-writing ſhall prove; and as this entry was made thirteen or fourteen years before this ſuit, it cannot be ſuppoſed to be dreſſed up to ſerve any particular purpoſe.

(*a*) 2. Vern. 606.

Caſe 144.

Wingfield *againſt* Newton.

Legacy, when lapſed or payable.

FERDINANDO WINGFIELD, by his will, dated the thirty-firſt of *March* 1731, made *Joſeph Wingfield* his executor, and gave to *Robert Newton* a legacy of one thouſand pounds, to be put out at intereſt until he ſhould attain his age of twenty-one; and in caſe of his deceaſe before the time, then the one thouſand pounds to go to *Margaret* his daughter; but if *Robert* lived to attain the age of twenty-one, then five hundred pounds, part of the one thouſand pounds, to go to *Margaret*, and to be paid her when *Robert* ſhould arrive at that age. *Margaret* died before that time.

THE QUESTION upon this part of the deviſe was, Whether, *Margaret* dying in the life-time of *Robert*, and before he attained his age of twenty-one, though he attained it afterwards, this ſhould be ſaid to be a lapſed legacy, or tranſmiſſible to the adminiſtrators of *Margaret*.

HARDWICKE, *Lord Chancellor*. I am of opinion, that this is not a lapſed legacy, but tranſmiſſible to her adminiſtrators. Indeed the general rule by the civil law is, that where a legacy is given after a time to come which is uncertain, there by the death of the legatee before the time of payment the legacy is lapſed; as in *Swinb.* 30. 393. *&c.* It is there alſo ſaid not to be material whether, in ſuch bequeſt, the uncertainty be joined to the ſubſtance of the legacy or to the execution of it; but that in either caſe the legacy is extinct. But that doctrine has been long ago over-ruled in this court by LORD NOTTINGHAM, in 2. *Ventr.* 347. *Anonymous*: A deviſe of one hundred pounds was to *J. S.* at the age of twenty-one years; and

and if *J. S.* died under that age, then to *A.* and *B.* or the ſurvivor. *A.* and *B.* both died in the life-time of *J. S.* and then *J. S.* died under twenty-one years; and it was decreed, that the adminiſtrator of *B.* who outlived *A.* ſhould have the one hundred pounds, notwithſtanding the legatee died before the contingency happened. So in *Pinbury v. Elkin* (*a*), Deviſe of all his eſtate to his wife, but in caſe ſhe died without iſſue by the teſtator, then eighty pounds to *J. D.*; *J. D.* dies in the life-time of the wife, and then the wife dies without iſſue: the legacy decreed to the adminiſtrators of *J. D.* And the like point in the caſe of *King v. Withers* (*b*), and in *Corbett v.* ——. From all which caſes it appears, and is alſo my opinion, that a contingent intereſt is tranſmiſſable to executors or adminiſtrators in equity as much as a bare poſſibility is at law, though it be not aſſignable. The only diſtinction is, whether the contingency depends upon ſuch an event: as if a legacy be given to *B.* upon the marriage of *J. S.* and *J. S.* dies without marrying, here his death before marriage has put an end to the legacy, becauſe it is now impoſſible that the contingency of the marriage ſhould ever take place; but ſo long as *J. S.* be alive, the event of his marriage, upon which the legacy depends, may happen, and ſo the contingent intereſt in the legacy will remain unextinct, whether the legatee live or not. So in the principal caſe, the contingency of *Robert*'s attaining to the age of twenty-one having happened, the legacy muſt charge the aſſets of the teſtator, and it is not material whether *Margaret* died before or after *Robert*'s attaining his age of twenty-one.

Conſtruction of a will as to what ſhall be conſidered an ademption of legacies.

ANOTHER QUESTION in this cauſe is as to a ſum of one thouſand three hundred pounds paid out of the teſtator's *South-Sea* annuities after the making his will and before his death, by way of annihilation, under the ſtatute of 4. *Geo.* 2. c. 5. it not appearing what is become of it; Whether this is to be conſidered as an ademption *pro tanto* out of the ſeveral legacies charged thereupon? or, Whether this ought to be made good to the legatees out of the aſſets in the hands of the executor?

As to this queſtion the caſe was thus: The teſtator had a great quantity of *South-Sea*, *Bank*, and *India* ſtock, and deviſed as follows: "*Item*, I give and deviſe to my daughter *Margaret Newton*, her "heirs and aſſigns, my rent-charge of twenty-five pounds a-year, "and all my money, goods, chattels, notes, bonds, ſecurities, and "perſonal eſtate, except all ſuch money or ſecurities for money as "I have in *Bank* ſtock, *India* ſtock, *South-Sea* ſtock, and *South-Sea* annuities, which I charge with the payment of my debts, "legacies, and funeral; and the ſurplus I give to truſtees for my "daughters." Afterwards, on the twenty-ſixth of *January* 1731, by a codicil, reciting, that he had changed his mind in ſome things, and confirmed it as to the reſt, he gives to his daughter *Margaret* the fifth part of the ſurplus of the *South-Sea* and other ſtocks and

(*a*) 2. Vern. 768. Prec. in Chan. 483. (*b*) Caſes T. T. 117.

annuities,

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annuities, to be at her own diſpoſal, and upon her death then to the ſurviving daughters. Between the making of the will and this codicil the thirteen hundred pounds was paid off. As to this part of the caſe, I AM OF OPINION, that this is not to be conſidered as an ademption of any part of the legacies, but that the deficiency ought to be made good to the legatees out of the aſſets of the teſtator. It has been inſiſted for the plaintiff, that the *South-Sea* ſtock charged with the payment of the teſtator's legacies was a ſpecific legacy of ſtock *ſtatu quo tempore doni*, and as ſuch would not admit of any ſatisfaction in value, but muſt be extinguiſhed as to ſo much which has been paid off. But I deny it to be a ſpecific legacy; and if not ſuch a legacy, the act of parliament is no ademption of it. It is plainly a general bequeſt of *South-Sea* ſtock, whether more or leſs, which the teſtator had at the time of his death; for though to ſome purpoſes a will muſt be taken to ſpeak from the time of its making, yet that rule holds only as to particular things or individuals, and not as to all perſonal legacies in general; but conſtruction muſt be made upon the whole will; and the teſtator's intent is to be conſidered, whether it was to extend the deſcription of the thing deviſed to the time of his death, or to confine it to the time of executing his will. In the preſent caſe it appears, that this is not a ſubſtantive independent legacy of *South-Sea* ſtock, but it is a legacy given by way of exception out of the general precedent legacy of the whole perſonal eſtate; and there is no doubt but this general legacy of his perſonal eſtate relates to ſuch perſonal eſtate as he had at the time of his death; and whatever money, goods, &c. he acquired after the making his will certainly paſs by ſuch will. Then the legacy which follows by way of exception muſt be conſtrued in the ſame manner; for as it is a maxim, that *Exceptio probat regulam in caſibus non exceptis*, ſo it is no leſs true, that the rule ſerves likewiſe to explain the exception; and in whatever manner the rule itſelf is to be taken, in the ſame manner ſhall the exception derived out of the rule be taken. To apply that to the preſent caſe: As the general bequeſt related to all the perſonal eſtate which the teſtator ſhould have at the time of his deceaſe, ſo likewiſe muſt the legacy, which is by way of exception out of the general charge, relate to the teſtator's whole perſonal eſtate which he had at the time of his deceaſe, and cannot be confined to the ſpecific *South-Sea* ſtock ſubſiſting at the time of making the will. Much ſtreſs has been laid on the manner of wording this deviſe; and it is obſervable, that the teſtator deviſes *all ſuch money*, not as he *ſhall have*, but as he has, in the *South-Sea*, *&c.* ſtocks. And therefore this being a deſcription in the preſent tenſe cannot be conſtrued to relate to any other perſonal eſtate than that particular ſort which he had at the time of his will. But I think this too ſtrict a conſtruction of a will, and not warranted by the plain ſenſe and meaning appearing upon the face of it. The diſtinction in general of words and tenſes is not ſo exactly obſerved in *Engliſh* as in other languages, eſpecially *Latin*. So in particular the preſent tenſe amongſt us is very uncertain in its ſignification. It is often uſed with us to denote a kind

of

of future preſent tenſe, or ſomething relative to the preſent which ſhall hereafter exiſt: and in this ſenſe I take it the teſtator has uſed it upon this occaſion, as he does likewiſe in another part of his will, where he gives a charity to the poor of the pariſh of *A. having no ſuch relief* as there is mentioned; which word "having" muſt plainly relate to the time when his intended charity was to take effect, that is, at the time of his death; nor can it admit of any other conſtruction. It is plain, that if the teſtator, inſtead of ſelling out, had purchaſed any more ſtocks after the making of his will, thoſe would have paſſed by the deſcription in the will; and there is the ſame reaſon here why the bequeſt ſhould relate here to ſuch *South-Sea* ſtock as he had at the time of his death. But there is another matter which ſtill further clears this point, and that is the codicil, which was made after the thirteen hundred pounds was paid off, and confirms the will in every particular not expreſsly altered thereby; ſo that by this the teſtator's intent is manifeſt beyond all doubt. As to the caſes cited, of ademptions of legacies, out of *Equity Caſes Abridged*, 301, 302. they are not applicable to the caſe in queſtion: for as to the caſe of *Ford v. Fleming*, which was 21 *July* 1728, before LORD KING (*a*), that was a bequeſt of a particular ſpecific ſum; for if it had been a general bequeſt, it would have been otherwiſe. The caſe of *Harding v. Smith*, before SIR JOSEPH JEKYLL, 8*th November* 1726, was likewiſe a ſpecific bequeſt, for it was of all monies due upon a mortgage of a certain farm named in the will: and the rule is general and well known, *Quod id certum eſt quod certum reddi poteſt.* The caſe of *Purſe v. Snaplin* (*b*), which was alſo before SIR JOSEPH JEKYLL, and reverſed by myſelf, was a legacy of a ſpecific ſum of five thouſand pounds ſpecified in the will by the name of *ſtocks*; but that caſe turned upon this conſideration, that ſtocks were legacies in words of quantity only. So *Partridge v. Partridge* (*c*) was a particular quantity; and *Brunſden v. Winter* (*d*) was a deviſe of ſpecific ſtocks and navy bills.

(*a*) 1. Eq. Abr. 302. 2. Stra. 823. 2. Peer. Wms. 469.
(*b*) 1. Atk. 414.
(*c*) 2. Eq. Abr. 570. 572. *in notis.* Caſes Temp. Talb. 226.
(*d*)

James Pipon, Philip Pipon, William Davies, and Others, *againſt* Elizabeth Pipon, Jane Pipon, John Hardy, and Others.

Caſe 145.

In Chancery, June 6, 1744. *Trinity Term*, 17. & 18. *Geo.* 2.

The laws and cuſtoms of the iſland of *Jerſey* conſidered with reſpect to the diſtribution of an inteſtate's effects.

JOHN PIPON, a native and inhabitant of the iſland of *Jerſey*, died inteſtate, on the eighteenth of *July* 1740, leaving no children, nor any father or mother, nor any brother; all the plaintiffs, except *Davies*, were the nephews and nieces of the ſaid *John Pipon*; and the two defendants, *Elizabeth* and *Jane*, were his ſiſters. The inteſtate, at the time of his death, had a conſiderable perſonal eſtate in *Jerſey*, but had no effects in this kingdom, except one

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one debt of ſix hundred and fifteen pounds ten ſhillings and one halfpenny, due by ſimple contract by *Henry Durell*, of *London*. Soon after the inteſtate's death, the plaintiffs, nephews and nieces, impowered the plaintiff *Davies* to take out of the prerogative court of *Canterbury* adminiſtration to the inteſtate for their benefit, which was accordingly done; and ſoon after the ſaid *Davies* received the ſaid debt of *Durell* in this manner, *viz.* fifty-one pounds ten ſhillings and one halfpenny in ſpecie, and the reſidue by the transfer of ſtock. Soon after this, the defendants, the ſiſters, having notice of the ſaid debt due from *Durell*, and of the adminiſtration granted to *Davies*, the defendant *Hardy*, by their order, obtained a repeal of the ſaid letters of adminiſtration, and procured a new adminiſtration to be granted to himſelf as their attorney. *Davies*, a little before the repeal of the adminiſtration granted to him, ſold the ſtock. The preſent bill was brought by the nephews and nieces to have a diſtribution of the inteſtate's effects in this kingdom, and particularly of the ſaid debt of ſix hundred and fifteen pounds ten ſhillings and one halfpenny. The defendants in their anſwer inſiſt, that by the laws of *Jerſey*, wherever an inteſtate leaves ſiſters and no brothers, but brothers children, his perſonal eſtate is to be divided among the ſiſters, in excluſion of the children of the deceaſed's brothers or ſiſters; and therefore that this debt muſt be divided between the defendants, *Elizabeth* and *Jane*, the inteſtate's ſiſters.

This cauſe was heard by conſent upon the bill and anſwer, and was argued by MR. CHUTE and MR. NOEL *for the plaintiffs* to this effect: The defendants do not put their caſe upon the ſtatutes of Diſtributions, but on the cuſtoms of *Jerſey*, by which they inſiſt, that the plaintiffs are incapable of taking any part of the inteſtate's eſtate. And the queſtion in this cauſe will be, Whether thoſe cuſtoms ſhall affect the property of effects in this kingdom? The diſtribution between debts due by ſpecialty and thoſe due on ſimple contract is well known to be this; that the former are *bona notabilia* in the dioceſe where they are, but the latter follow the perſon of the debtor, and are *bona notabilia* where he dwells. They could not, therefore, have recovered this debt without taking out adminiſtration here; and upon taking out adminiſtration, they muſt have given a bond to the ordinary to make diſtribution according to the ſtatute; and conſequently this debt muſt be diſtributable according to the ſtatute. But the defendants ſeem to inſiſt upon a proviſo or ſaving in the act of the cuſtoms of *London* and the province of *York*, and of other places having known and received cuſtoms peculiar to them. But this proviſo cannot be taken to extend to any places out of the kingdom, and therefore can be of no ſervice to the defendants. In the province of *York*, that third part which neither the wife nor children can claim by the cuſtom is diſtributable according to the ſtatute. 2. *Vern.* 82. it is held, that the cuſtoms of the province of *York* are local; and it is the locality of the effects that gives the ſpecial court juriſdiction to grant adminiſtration; as the debt was here, they were obliged to take out adminiſtration in *England*, and the ordinary

ordinary upon granting it is required to take bond from the adminiſtrator to make diſtribution according to the ſtatute; and it is very difficult to account for this method of proceeding, unleſs the effects are to be diſtributed according to our laws; and a contrary conſtruction would entirely reſcind all the proviſion and ſecurity required by the act of parliament.

ANOTHER COUNSEL *for the plaintiffs* ſaid, that the Court cannot take notice of the laws of *Jerſey*, and that the effects being in *England* muſt be ſubject to the ſtatute, *Jerſey* not being within the proviſo or ſaving of the act.

MR. ATTORNEY-GENERAL *for the defendants.* The laws of *Jerſey* are ſeparate, diſtinct, and independent, of the laws of *England*, though not of the Legiſlature of *England*. It is inſiſted on by the defendants anſwer, that by thoſe laws the ſurviving ſiſters of an inteſtate are entitled to his perſonal eſtate, in excluſion of the children of his deceaſed brothers and ſiſters, and therefore that the plaintiffs are not entitled to any part of the inteſtate's eſtate. The plaintiffs have not replied to the anſwer, and therefore it muſt be taken to be true. It has been contended for the defendants, that the perſonal eſtate is merely local, and that the right the next of kin to an inteſtate have to it depends upon the locality of it, or upon the place where it is found at the time of his death. I ſhall inſiſt upon the reverſe of this propoſition. They have not ſhewn any one inſtance in which the Court has conſidered it in the light they contend for; but all their inſtances, and the nature of the caſe, prove the contrary. The nature of perſonal eſtate is, that it attaches on the perſon; and the nature of the real eſtate is, that it is attached to the place, becauſe it is a fixed thing. The very meaning of perſonal eſtate is that thing which belongs to the perſon. Suppoſe a perſon is an inhabitant, and dies, in the province of *York*, and has *bona notabilia* in that province, and alſo in the province of *Canterbury*, there muſt be an adminiſtration taken out in both provinces, and yet the perſon who took out adminiſtration in the province of *Canterbury* muſt make diſtribution according to the cuſtom in that province.

HARDWICKE, *Lord Chancellor.* That is a caſe directly within the proviſo.

MR. ATTORNEY-GENERAL. It is ſo; but the mere locality of the perſonal eſtate does not create any right in reſpect to the diſtribution. The locality of the perſonal eſtate determines nothing but the juriſdiction that is to grant the adminiſtration; but the diſtribution depends upon the quality of the perſon, either as a freeman of *London* (which follows the perſon whereſoever he goes), or as an inhabitant of this or that particular province.

HARDWICKE, *Lord Chancellor.* *Hardy* the adminiſtrator and all the perſons intitled to the diſtribution live in *Jerſey*. The adminiſtration to *Davies* being repealed, he is now become a debtor to *Hardy*; and the caſe is in the ſame ſituation as it would have

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been if the debt had continued in the hands of the original debtor. How can I decree an account to be taken here of the whole perſonal eſtate? and without that, how can it be known what will remain in the hands of the adminiſtrator after payment of the inteſtate's debts? It would affect the commerce of this kingdom to a very great degree. Merchants abroad have debts here; and if thoſe ſhould be diſtributed according to the laws of *England*, it would be a moſt miſchievous thing to the commerce of this country; and no diſtinction was ever made between the effects a man has here and thoſe he has abroad. In the caſe of *Van Theman*, before my LORD KING (*a*), *Colone Van Theman* brought his bill for a diſtribution of the effects of his late wife, which ſhe was intitled to by a legacy from the firſt huſband; and an account was decreed. I was Counſel for the plaintiff, but not ſatisfied with the decree. However, it was made by default, the principal defendant not having anſwered, but *Mr. Jacobſon*, the truſtee, was the only one who put in any anſwer; and that point, how far the law of *England* attaches on goods here, was mentioned, but not determined, the decree being made by default. I had a great doubt about it in reſpect to the inconveniencies it would bring upon trade. Beſides, that was a queſtion about ſtock, which is a ſpecific part of the perſonal eſtate, and may differ from the caſe of a mere debt, which follows the perſon of the debtor wherever he is.

MR. ATTORNEY-GENERAL. Can it be ſuppoſed that the right of diſtribution ſhould depend upon the removal of the debtor? The adminiſtration is nothing but an authority to get in the effects of the inteſtate. In the caſe of *Burrows v. Jamineau* 1726, in chancery (*b*), a perſon drew a bill here, on a perſon at *Leghorn*, who accepted it there; and the drawer was a bankrupt in *London*, but the acceptor had notice of it: the acceptor was ſued at *Leghorn*, and ſentence was given for him, becauſe, by the laws uſed there, if a perſon accept a bill of exchange, and had no effects of the drawer in his hands at the time the bill was drawn, or had no notice of the bankruptcy, the acceptor is not liable. It happened, that the acceptor came here, and was ſued at law. Upon which he brought his bill in this court for relief and an injunction; and he was relieved; and the Court ſaid, that the acceptance at *Leghorn* bound the acceptor according to that place.

HARDWICKE, *Lord Chancellor*. The ſtrongeſt objection in that caſe was, that if it was right it was only a conditional acceptance, and that advantage of it might be taken at law.

MR. ATTORNEY-GENERAL concluded his argument with citing at large the caſe of *Jeanbert v. Twiſt*, *Preced. in Chan.* 207. to ſhew, that the Court will take notice of the laws of foreign nations.

MR. SOLICITOR-GENERAL *on the ſame ſide for the defendants.* The Court may diſmiſs the plaintiffs bill without going into the

(*a*) 2. Eq. Abr. 425. Fitzg. 203. (*b*) 2. Stra. 733. 2. Eq. Abr. 524.

merits

merits of the case; for the only way by which the present question is brought before the Court is by the administration which the plaintiffs fraudulently obtained to be granted to their attorney, which has been since repealed by the ecclesiastical court. *Davies* having by false suggestions taken out letters of administration receives the debt of *Durell*, and joins in this bill to prevent the true administrator from getting it out of his hands; and in this manner the cause is brought before the Court. If this had not been done, *Durell* might have paid the debt to the administrator in *Jersey*, and he would have made distribution according to the laws there: if that had been done, this Court would not have called that matter in question, and therefore it is owing to their fraudulently getting the money into their hands that the present question is brought before the Court. This misbehaviour of theirs is not to be encouraged; and on that foundation the bill may be dismissed without entering into the general question.

HARDWICKE, *Lord Chancellor*. I would not, if I could avoid it with justice to the parties, enter into the general question. It is admitted, that *Davies* under the first administration, which is now repealed, received this debt due from *Durell*. By that, he is a debtor merely to the estate of the intestate, and he has nothing to do to come here, but ought to pay it over to the rightful administrator. The difficulty is, where the other complainants, the nephews and nieces, have not a right to come here, not to call *Davies*, but to call *Hardy*, to an account for this particular part of the estate abstracted from the rest of it.

MR. CHUTE *for the plaintiffs*. *Mr. Hardy* is now, and hath been all along, in *England*; he took out administration, and has answered under the process of this court: the effects are here; and therefore the plaintiffs have a right to have this matter examined into in this court. With respect to the general question, I know no case that will influence it, but hope it is properly brought before the Court.

HARDWICKE, *Lord Chancellor*. I AM OF OPINION, that there is not a sufficient ground for me to decree an account for the plaintiffs. I am very unwilling to determine the general question in this case, which may admit great variety of constructions, and some difficulty too; therefore I chuse to determine the case without entering into it. If I was to enter into the general question, I should think, that a man's personal estate is supposed to follow his person wherever he is, and is distributable according to the laws of that country where his person is; and as to the different jurisdictions relating to this personal estate in respect to the probate of wills or administrations, they arise from the nature of the remedy that is to be made use of for the recovery of that estate; and therefore to enable a person to sue for any part of the personal estate, he must qualify himself from that which is the proper jurisdiction of the place where the personal estate lies, but does not determine the right of the equitable property, or to that property which is considered in equity, or in the

JAMES PIPON, PHILIP PIPON, WILLIAM DAVIES, AND OTHERS, *againſt* ELISABETH PIPON, JANE PIPON, JOHN HARDY, AND OTHERS.

canon or eccleſiaſtical law, in diſtributing the ſhares of that perſonal eſtate; and therefore the caſes that have been put are right, and prove this: If a man be an inhabitant of the province of *York*, and die there, having goods both in that province and alſo in the province of *Canterbury*, it is incumbent on his adminiſtrator to take out adminiſtration in both provinces; and yet, notwithſtanding, the whole perſonal eſtate will be diſtributable according to the cuſtom of the province of *York*; which ſhews it is not the juriſdiction out of which the adminiſtration muſt be taken which is neceſſary to give the party a right to ſue that will govern the right and intereſt in diſtributory parts of that eſtate. Then conſider the preſent caſe. It is rightly ſaid, that *Jerſey* muſt be as much conſidered a foreign country in reſpect to the laws of *England* as if it were not parcel of the crown of *England*, for it is no part of the kingdom of *Great Britain*, but is a diſtinct dominion, which the king of *Great Britain* is intitled to in right of his duchy of *Normandy*, and conſequently governed by the laws of *Normandy*. Then the caſe is thus: A man is an inhabitant and dies in a foreign country; the bulk of his perſonal eſtate is there; he happens to have a debt owing to him in *England*, which cannot be recovered without taking out adminiſtration in *England*; the queſtion is, Whether that ſhall be conſidered as part of the bulk of his perſonal eſtate to be accounted for according to the laws of the place where he is reſident? or, Whether any perſons not reſident in *England*, but inhabitants of a foreign country, who by the laws of that foreign country have no right to any, but would have a right by the laws of *England*, can come into this court, and by reaſon of the taking out of adminiſtration here can compel that adminiſtrator to account to them for this part of the perſonal eſtate abſtracted from the reſidue of that eſtate? If that were the mere queſtion before me, I ſhould incline to think (but I do not mean to give any opinion to bind me), that it could not be done, and would be extremely miſchievous, and greatly affect the commerce of theſe kingdoms. No foreign merchant would know how to deal here, but at the peril of having all his debts here ſeparated from the reſt of his perſonal eſtate, and diſtributed according to the laws of this kingdom. The bond required by the act is, that the adminiſtrator ſhall account before the judge of the eccleſiaſtical court, and pay the reſidue of the inteſtate's goods, chattels, and credits, to ſuch perſons as the ſaid judge or judges ſhall appoint purſuant to the ſtatute. What is it that is to be diſtributed? It is the reſt and reſidue of the perſonal eſtate after payment of debts and other juſt allowances. Nobody can come here for an account of part of the eſtate, but muſt pray an account of the whole eſtate. How can this reſidue be made appear but by accounting for the whole eſtate, and not by an account of a particular debt only; and therefore on the words of the ſtatute I ſhould think there could be no ſuch decree as is now prayed: and do but conſider what work it would make. The general adminiſtrator is not before the Court; how can I decree an account of the whole eſtate? and without it I cannot find out the reſidue: and if the general

general adminiſtrator were before the Court, I might decree an account; but the conſequence of it would be, that if the adminiſtrator accounts here, and has ſuch allowances, and makes ſuch diſtributions as are agreeable to the laws of *England*, the courts of *Jerſey* might decree him to account with different allowances and different diſtributions. But the only matter now to be determined is, whether the preſent bill is properly brought? as the firſt adminiſtration is repealed, and a new one granted; and as to *Davies* being a plaintiff, the bill is improper, for he is now only a debtor to the eſtate, and conſequently a debtor to the ſecond adminiſtrator. What has he to do to come here to pray an account to be taken? He is a debtor to the eſtate, and liable to an action at law by the adminiſtrator, who may, the next day he recovers it, carry it into *Jerſey*, and account for it there: and that would be the right way, and is the common caſe of all perſons who are ſubjects of foreign princes and have debts here. *Davies* is therefore to be laid out of the caſe; and in reſpect to the other plaintiffs, they have nothing to do to come here for an account of this particular part of the perſonal eſtate. They have a right to call the general adminiſtrator to an account; but no perſon entitled to a ſhare of the reſidue of the eſtate can come into this court for a particular part of that eſtate detached from the reſt. The general adminiſtrator is not before the Court, and therefore I cannot decree an account. The bill muſt be diſmiſſed with forty ſhillings coſts only, as the cauſe was heard by conſent on bill and anſwer.

JAMES PIPON, PHILIP PIPON, WILLIAM DAVIES, AND OTHERS, *againſt* ELIZABETH PIPON, JANE PIPON, JOHN HARDY, AND OTHERS.

Jobſon *againſt* Pelly. Caſe 146.

In Chancery, Trinity Term 1744.

WILLIAM JOBSON, in the year 1719, gave a marriage bond of one thouſand pounds to truſtees to the uſe of his intended wife. He afterwards married her, and died, and by his will gave her an annuity of forty pounds *per annum*, clear of all deductions, out of the produce of his eſtate.

An annuity of 40l. a-year deviſed to a wife is no ſatisfaction of 1000l. ſettled on her previous to the marriage.

The queſtion was, Whether this annuity be in ſatisfaction of the bond?

After reading the evidence, and hearing a few arguments from THE ATTORNEY-GENERAL, THE LORD CHANCELLOR ſaid, he never knew a more frivolous defence or a plainer caſe; that even if the annuity had amounted in value to the purchaſe-money of one thouſand pounds it had not been ſufficient, becauſe of the particular penning; though he ſaid, in ſome caſes that might have made the matter more diſputable: but in this he had no doubt in directing, that the teſtator's eſtate ſhould be liable both to the marriage bond and the annuity; for it could not be intended as ſatisfaction.

Caſe 147.

Meadbury *againſt* Iſdall and Freind.

Trinity Term, 1744.

In what caſes the court of chancery will admit the defendant's teſtimony.

HARDWICKE, *Lord Chancellor*. The rules of this court differ from the rules of law with reſpect to the admiſſion of a defendant's teſtimony. If a plaintiff at law make ſeveral defendants, he cannot examine one of them as a witneſs in a caſe of the crown. This was determined in the king's bench by the whole Court, where *the Attorney-General*, TREVOR, had concluded his evidence without proving anything againſt one of the defendants; and upon offering to make him a witneſs, an objection was made to his competency; and after long debate he was refuſed PER TOTAM CURIAM. He afterwards entered a *nol. proſ.* and then he was admitted. In this court the rule is different; the plaintiff is intitled to the evidence of any of the defendants; but then there muſt be always a ſuggeſtion in the order, that ſuch defendant is not intereſted in the event of the cauſe. How ſtands the preſent caſe? Here is a charge in the bill againſt the ſeveral defendants, one of whom the plaintiff would make uſe of by way of witneſs againſt the other; the defendants, both of them, have put in their anſwer, and the plaintiff makes no reply to one, but leaves the charges ſtanding to the bill. If his caſe comes out to be true, he is intitled to a decree againſt them both, and a contribution; ſo that they are both intereſted in the event, and the plaintiff cannot be entitled to either of the evidence. He ought to have moved to amend his bill, and ſtruck out the charge againſt the defendant *Mr. Freind*, and then he might have been admitted; but as it is he cannot.

Caſe 148.

Skip *againſt* Edwards.

In Chancery, Trinity Term, 1744.

If *A* take a joint bond from *B. C.* and *D.* and afterwards accept the notes of *B.* and *C.* in diſcharge of the bond chancery will not afford *A.* relief againſt *D.* on the notes not being paid, *D.* being a mere ſurety, and not having received any part of the conſideration-money.

IN 1739, the plaintiff advanced the ſum of two thouſand pounds to two joint traders, *Hervey* and *Wilcox*, upon their bond, in which the defendant, *Mr. Edwards*, was a ſurety. At the expiration of a year, *Mr. Edwards* growing uneaſy inſiſted upon the bond's being paid off, that he might be clear; and accordingly the two co-obligors had afterwards a meeting with the plaintiff in order to diſcharge the ſame. By way of payment, they drew two notes upon different people payable at a future day, and alſo gave him a goldſmith's note, which (it being on a *Saturday* night) was made payable the *Monday* following. The plaintiff, *Mr. Skip*, delivered up his bond, with a receipt indorſed in theſe words: "Received "in notes and caſh the full contents of this bond." He at the ſame time took a note from *Hervey* and *Wilcox* in theſe terms: "The above notes being payment of ours and *Edwards*'s "two thouſand pounds bond, if any of the ſaid notes ſhould

"not

"not be paid, they ſhall be made good by us, *Hervey*, *Wilcox*;" and *Mr. Edwards*'s name, who was not privy to this tranſaction, was likewiſe ſigned by *Hervey*. It appeared, that the perſon upon whom one of the notes was drawn, proved inſolvent by becoming a bankrupt before the day of payment. The goldſmith's note was alſo refuſed, and the plaintiff, *Mr. Skip*, received for anſwer, that they had none of the drawer's money in their hands, it having been all taken out by *Hervey* the *Saturday* before. *Hervey* himſelf became a bankrupt, and a commiſſion was awarded againſt him the *Monday* next after this matter was tranſacted. Upon this the plaintiff brought his bill againſt *Edwards*, the ſurety in the original bond, praying that he might be liable to pay the reſidue of the two thouſand pounds due thereon, it having been fraudulently procured from the plaintiff upon falſe pretences.

Skip against Edwards.

And it was argued by MR. CHUTE and MR. CLARKE *for the plaintiff*, that the notes were only conditional payment; and though the bond was delivered up, the debt was retained. *Salk.* 127. *Clerk v. Mandell*, Notes payable at a future day ſhall not be looked upon as a diſcharge of a precedent debt or contract. They are all three principals in the original bond, and nothing has ever moved from *Mr. Edwards* that can diſcharge him. If it had, it would have altered the queſtion, and made the contract more doubtful, whether it ſhould interfere in behalf of the plaintiff to make the defendant pay the debt twice over. If the queſtion had been, Whether the obligee, or *Mr. Edwards*, ſhould ſuffer by *Hervey*'s ſinking the money? in that caſe the ſcale would perhaps turn againſt the plaintiff. But here the queſtion is, Whether one man ſhall be injured and another advantaged by fraud? and not, Whether one or other ſhall be ſufferers? Does the nature of this tranſaction import that ſuch notes ſhall be received in abſolute diſcharge of a bond? Would anybody in their ſenſes accept of ſingle notes in diſcharge of a bond with three obligors? There are ſeveral caſes where acceptance of notes payable at a future day, if no *laches* in the party, are no diſcharge. *Salk.* 442. *Ward v. Evans.* It is to be conſidered, Whether *Mr. Edwards* has not made himſelf party to the note given by *Hervey* and *Wilcox*, *ut ſupra*; for he has done nothing himſelf in diſcharge of the bond, but is taking advantage of the tranſaction between them and the plaintiff; and if he ſhould not be bound by their note, it would be making uſe of an act which they have done in his name in one reſpect, and not being bound by it in another. We come before the Court in a very favourable light, it being to be relieved againſt a fraud; and all we pray is, to be reinſtated into the ſame ſituation that we were before the fraud committed.

Hankey v. Jupman, B. R. Mich. 1748.

MR. ATTORNEY-GENERAL and MR. SOLICITOR-GENERAL *for the defendant*. It is agreed, that the plaintiff has no claim at law, becauſe the bond is cancelled and delivered up. The queſtion is, Whether he be intitled to relief in equity? It muſt be granted, that there are ſome caſes where a bond may be cancelled ſo as to

SKIP *againſt* EDWARDS.

defeat a claim at law, and yet the plaintiffs may be relieved in equity; and they on the other hand muſt allow likewiſe, that in many inſtances the extinguiſhment of the title at law is ſo likewiſe in this court. The queſtion is, Which of theſe alternatives the preſent caſe falls under? In caſes of mere accident, as of a bond cancelled by miſtake, burnt, or deſtroyed by any misfortune, or delivered up by fraud, the plaintiff would be intitled in this court; but where a perſon, with his own eyes open, agrees to alter the ſecurity and deliver up the bond, and no fraud committed on the part of the defendant, it is ſurely otherwiſe. *Mr. Edwards* was only a ſurety; no part of the conſideration-money paid to him; and therefore not neceſſary that anything ſhould move from him in diſcharge. He never looked upon himſelf as bound any further than in law, and therefore conſidered the delivery up of the bond as a ſufficient diſcharge; and this would have prevented him from taking any further ſteps againſt *Hervey* and *Wilcox* to ſecure himſelf, which he might have done if he had not reſted eaſy. Beſides, the plaintiff does not come with pure hands; he has made *Hervey* guilty of forgery; and a court of equity will not permit ſuch a clandeſtine note to bind a third perſon. This was a fraud intended by him to *Edwards* in delivering up the bond, and at the ſame time endeavouring to keep him bound by a clandeſtine note. But a court of equity of all things avoids ſuch underhand agreements.

1. Vern. 196. Ratliffe v. Greens.

HARDWICKE, *Lord Chancellor*. I have had ſome doubts during the hearing of the cauſe, but am at laſt fully ſatisfied, that the plaintiff is not intitled to relief. It appears, that the defendant was only a ſurety, and has been guilty of no fraud himſelf. As to the general point, there is no queſtion but there are many caſes in which a debt may be diſcharged, but a court of equity will ſet it up, and that againſt the ſureties as well as the principal. If a bond be deſtroyed by accident, the ſurety is liable in this court as well as the principal. So if one of the principals ſhall procure the bond to be cancelled by fraud, upon a bill this Court would ſet up the bond againſt the ſurety as well as the principal, becauſe a creditor ſhall not be prejudiced by the fraud of one of his debtors againſt the reſt. But the preſent caſe does not come up to any of theſe; for here were ſecond ſecurities ſet up for the very purpoſe of diſcharging *Mr. Edwards*, and that with the knowledge and conſent of the plaintiff himſelf. The defendant did not at all appear in the tranſaction; *Hervey* and *Wilcox* ſettled it in their own manner; and *Mr. Skip* was left to judge for himſelf what kind of ſatisfaction he would take. Provided *Edwards* was left out, he might have refuſed intirely, but inſtead of that he accepts of two drafts, and a goldſmith's note, &c. It is a very unuſual thing for goldſmiths notes to be made two days after the draft; and therefore his accepting of ſuch a note from *Hervey* ſhews a confidence in him and the ſecurities which he gave him. *Mr. Edwards* did not think proper to truſt them any longer, but the plaintiff did; and the rule of this court is, that he who truſts moſt ſhall loſe moſt. Suppoſe *Mr. Skip* had refuſed to do this, and the bond had not been delivered up,

up, *Edwards* might have arrested *Hervey* and *Wilcox* when he thought proper, and have taken care of himſelf. It was not a right thing of *Mr. Skip* to accept the clandeſtine note; for what was the ſcope of the whole tranſaction? It was, that *Mr. Edwards* ſhould be diſcharged. The taking of the note was therefore a deceit on *Mr. Edwards*, by delivering the bond up and making him believe he was diſcharged, and at the ſame time endeavouring privately to continue him bound by virtue of this note. And this rebuts the fraud on the part of *Hervey*, with reſpect at leaſt to the preſent defendant, *Mr. Edwards*. And therefore I AM OF OPINION upon the whole, that the plaintiff is not intitled to relief: there was no fraud on the part of *Mr. Edwards*; the nature and deſign of the tranſaction was to diſcharge him; the plaintiff was acquainted with this deſign, and was at liberty to make his own bargain; he has thought fit to change the ſecurity for one which the defendant is not bound by. But I do not think this ſo clear a caſe as to diſmiſs the bill with coſts.

SKIP *againſt* EDWARDS.

Wilſhaw *againſt* Smith. Caſe 149.

In Chancery, Trinity Term, 1744.

BILL to redeem a mortgaged eſtate upon payment of principal and intereſt down to a certain day only. The premiſes were mortgaged to the defendant for three hundred pounds. The plaintiff gave notice in writing, that he would pay it off, and came to the defendant's houſe with the money, agreeably to the notice. The plaintiff brought an aſſignment of the mortgage in his boſom, which the defendant refuſed to execute; upon which the money was carried back again.

On a tender to redeem a mortgage, the mortgagee is intitled to have a reaſonable time to peruſe the aſſignment.

The queſtion was, Whether this was ſuch a refuſal in the mortgagee as ſhould ſtop his title to intereſt, and conſequently the coſts of this ſuit?

FOR THE DEFENDANT. A refuſal to ſtop intereſt muſt always be an abſolute refuſal, and not a conditional one. This was only conditional; for the defendant refuſed to execute the aſſignment, if the plaintiff would not let him have time to peruſe it by himſelf, and Counſel. This was a reaſonable requeſt; and for a perſon to execute a deed without having it examined by ſomebody who underſtands it, is ſomething too hard for this Court to require; and therefore this will not be looked upon as a proper tender to ſtop intereſt. Beſides, the plaintiff has laid by for near two years ſince the refuſal, and this delay ſhews his acquieſcence under the reaſons which were then given.

FOR THE PLAINTIFF. The time then before filing the bill was but a year and a quarter, and no intereſt paid in the mean time; ſo that nothing has been done by the plaintiff to waive any right or privilege that he might claim on account of the tender; and as a tender

WILSHAW *against* SMITH.

tender was made, it was their buſineſs to have come firſt into this court. Our witneſſes deny that the mortgagee deſired time to peruſe the aſſignment, or that the plaintiff refuſed him the liberty of doing ſo; and the mortgagee is not to put the mortgagor to the expence of bringing a bill into this court to have a redemption.

HARDWICKE, *Lord Chancellor*. I have hardly ever ſeen a cauſe of this ſort where bills have been brought to redeem upon ſuggeſtion of a tender that has been for the benefit of either of the parties. Such ſuits are generally worked up by ſome troubleſome practitioner who has a mind to have a cauſe; ſome country attorney, who firſt perſuades the party to make a tender, and then, if the leaſt diſpute ariſe, a bill is brought into this court to redeem without payment of intereſt. But there are very few of theſe inſtances wherein the Court decrees the intereſt to be ſtopped, nor ſhall I do it in the preſent caſe: for, in the firſt place, the *tender was not ſtrictly a legal one*; but as nothing has been objected to it by the defendant, I ſhall lay no ſtreſs upon that. As to the aſſignment, there is no doubt but the defendant had a right to inſiſt upon its being peruſed by ſomebody who underſtood it. A man is not obliged to execute a deed before he has time to conſider of it. The plaintiff, if he had a mind the whole buſineſs ſhould be tranſacted at that time, ought to have ſent a draft of the aſſignment ſome time before; and as he has not done ſo, the defendant's requeſt that it ſhould be left in his cuſtody was very reaſonable; and if the plaintiff had complied with this, he might himſelf have appointed the day for payment afterwards; and then, upon the defendant's refuſal a ſecond time, he would have been regular in applying to this Court. There is a contrariety in the evidence; but I think credit ought to be given to the defendants. The plaintiff's witneſſes ſwear, that the defendant abſolutely refuſed to take the money. The defendants agree that he refuſed; but for what reaſon? Becauſe he would take further time to conſider of and peruſe the deed. This is going further, and ſeems to be more fair than the plaintiff's evidence. Beſides, this is corroborated by what they ſay afterwards, and which is not denied by the plaintiff, that he went up ſtairs to fetch the mortgage-deeds, and was ready to receive his money, till this diſpute aroſe. Therefore I am of opinion, that the plaintiff can only redeem upon the common terms, *viz.* upon payment of principal, intereſt, and coſts.

Caſe 150.

Dillon *againſt* Green.

In Chancery, Hilary Term, 1743.

In what caſes the court of chancery will permit a new ſpecial original to be filed after a judgment by default.

THE PLAINTIFF had letters of exchange drawn by a merchant at *Liſbon* upon the defendant, his correſpondent at *London*, payable thirty days after ſight. They were ſhewn to and accepted by the defendant on the twenty-ninth of *October* 1743, and the plaintiff, before the thirty days were expired after which the money was to become payable, brought his action. The original in the action

was

taken out, and bore *teſte* the fifteenth of *November* 1743 (though the time of payment was not till the twenty-ninth), and was returnable the laſt day of *Michaelmas Term*. Upon a return of the original, a *capias* was taken out, returnable the firſt day of *Hilary Term*. Judgment afterwards went by default, and was entered up; and the defendant brought error into the Houſe of Lords; and aſſigned for error, that the original bearing date before the day of payment, the action was commenced before the cauſe of action aroſe. Upon this the defendant applied to this Court, and got an order from the Maſter of the Rolls, that a new ſpecial original ſhould be filed, bearing date the laſt day of *Michaelmas Term*, returnable the firſt day of *Hilary*. DILLON *againſt* GREEN.

This order was moved to be diſcharged by THE ATTORNEY-GENERAL, upon ſuggeſting, that this was an error in ſubſtance, and not in form; for that the commencing a ſuit againſt a perſon for a debt before it was actually due was a very ſubſtantial act of injuſtice, and ſo illegal a method of proceeding as deſerved not the ſanction of this Court: that this caſe, therefore, did not fall within the reaſon of any of thoſe caſes where, for any irregular proceedings in the forms of law, or where, perhaps, judgments have been obtained without any original at all, this Court has interfered in ordering originals to be filed: that if the commencing an action before the cauſe of action aroſe ſhould be encouraged by this Court, great inconveniencies would enſue: that, after all, if the plaintiff could obtain an original in this caſe, as he deſired, the conſequence would be, that the original and the *capias* would both bear *teſte* and be returnable the ſame days, which would be abſurd; for it is a known rule, that a *capias*, which is founded upon an original, cannot be taken out until the return of the original, and cannot be returnable of itſelf until fifteen days, at leaſt, after it is taken out. Pond v. King, Mich. 20. *Geo.* 2.

For the other ſide was cited, by MR. CLARKE, *Philips v. Philips*, on the thirteenth of *December* 1737.

HARDWICKE, *Lord Chancellor*. The queſtion is, What authority has this Court to interfere in ſupplying new originals? and the determination of it will depend more upon the authorities and precedents than upon the reaſon of the caſe. It is ſaid, the defendant has been ſued before the cauſe of action accrued. How? By the original's bearing date before the day of payment. This certainly is error, but there ſeems to be no ſubſtantial injury in this error; for there is no doubt but by the late invented method of *latitats* and *capias's* founded upon *clauſum fregit* originals the defendant might have been brought to appearance as ſoon as he was in the preſent caſe. Where then is the injury? This is a ſpecial original *capias*, ſetting forth the particular nature of the caſe, and is a much ſlower method of proceeding than that upon *clauſum fregit* originals. There are many inſtances where a *capias* upon *clauſum fregit*, &c. has been taken out without any original at all previous to the *capias*. The judgment ſubſequent to ſuch proceſs is certainly void in itſelf; and yet in theſe caſes (notwithſtanding

DILLON *againſt* GREEN.

ſtanding the intent of the party in neglecting to take out an original ſeems to be to defraud the crown of its revenue), the conſtant practice is, that upon application to the Curſitor within ſeven days after the judgment, an original will be granted of courſe: if the party ſuffer the ſeven days to lapſe, he muſt then apply to the Court for a ſpecial order, and the Court will grant it him.

April 20, 1738. The caſe of *Loſters v. Baker* was thus: The defendant was indebted to the plaintiff in the ſum of one thouſand four hundred pounds. The plaintiff, who had for ſeveral years been abroad, returned to *England* on the ſeventh of *May* 1737, and upon his return brought his action for the debt in the king's bench. The original bore *teſte* the ſixth of *April* 1737, returnable the firſt day of *Eaſter Term*. The defendant pleaded the ſtatute of Limitations. To which the plaintiff replied, that he had been beyond the ſeas, and that he returned the ſeventh of *May* 1737, and brought his action within ſix years after his return to *England*, which was ſufficient according to the ſtatute. But it appeared, that the *teſte* of the original bore a date *prior* to his return, which was, therefore, inconſiſtent with his reply, and excluded him from the ſaving of the ſtatute. However, upon application to this court, the Maſter of the Rolls ordered a new original to be filed, bearing a date ſubſequent to the ſeventh of *May* 1737, which was the day of his return. This caſe comes very near to, and is full as ſtrong, as the preſent. But upon the reaſon of thoſe other caſes where judgment has been permitted to go by default, and afterwards error aſſigned for want of an original, and in which this Court has always interpoſed in ordering originals to be filed, I think that I might determine that this order ſhould ſtand. There can be no injuſtice in doing ſo; and I think there will be no harm in putting a ſtop to that common method of letting judgment go by default, and afterwards aſſigning for error ſome default in the proceedings,

Caſe 151.

Walſh *againſt* Patterſon.

In Chancery, Michaelmas Term, 1742.

In what caſe the diſjunctive "or" ſhall be taken to mean the conjunctive "and"

J. S. deviſes his lands in this manner: "As to all my real eſtate "wherewith I ſhall die poſſeſſed, I give and deviſe one-third "part thereof unto my wife, her heirs, and aſſigns, for ever; and "the other two-thirds I give to my ſon *John*, his heirs and aſſigns, "for ever; but my mind and will is, that in caſe my ſaid ſon "ſhould die before his age of twenty-one years, and without "leaving any iſſue behind him, or in caſe any ſuch iſſue ſhould die "before they attain their age of twenty-one years, that then the "ſaid two-thirds ſhould go to my wife and her heirs for ever." Afterwards, by a codicil reciting that he had diſpoſed of his eſtate *ut ſupra*, he now wills, that in caſe his ſaid ſon ſhould die before his age of twenty-one years, without iſſue as aforeſaid, that then the eſtate ſhould go to his wife for life, remainder to *Stephen Dickenſon* in tail, remainder to *John Dickenſon* in fee. The teſtator's ſon

John

John attained his age of twenty-one years, and afterwards died without iſſue, leaving a legacy of five hundred pounds to the plaintiff, charged upon the lands above-mentioned.

The queſtion was, Whether *John* took ſuch an eſtate under his father's will as ſhould be liable to his debts and legacies?

And it was argued by THE SOLICITOR-GENERAL, that this was an eſtate-tail in *John*, and therefore not chargeable with his legacies; for though, in the words of the will, the conjunction *and* is made uſe of, which couples the two contingencies together, ſo that they muſt both happen before the deviſe ever can take effect, yet by the codicil it is otherwiſe, for the conjunctive *and* is by the codicil changed into the disjunctive *or*; and this makes an alternative, *viz.* in caſe the ſaid *John* ſhould die before twenty-one, or in caſe he ſhould die without iſſue, then the eſtate ſhould go over; and a codicil has power to alter, correct, or explain a will.

HARDWICKE, *Lord Chancellor*. The words *or* and *and* make no difference; for it has always been determined, that where an eſtate is given to a man and his heirs, and in caſe he die before twenty-one, *or* without iſſue, that in ſuch caſe the word *or* ſhall be conſtrued *and*, for this plain reaſon, that if a contrary conſtruction ſhould prevail, the deviſee might have a ſon born before twenty-one, and if the father ſhould die without attaining that age ſuch ſon would be diſinherited.

MR. SOLICITOR-GENERAL. The caſe of *Stearl v. Garrard*, in *Cro. Eliz.* and *Moor*, 422. is a caſe in point; and there the Judges were of opinion that it was an eſtate-tail. And as to the hardſhip mentioned by your Lordſhip, if the party has made ſuch a diſpoſition of his eſtate, it cannot be remedied. And of that opinion was your Lordſhip in the caſe of *Bellaſis v. Uthwait*, ſome time ago in this court, where one deviſed an eſtate to his daughter, but in caſe ſhe died before twenty-one, remainder to a charity: the daughter died before twenty-one, leaving a child behind her; yet determined, that the eſtate muſt go over, for that however it might be the teſtator's intent that it ſhould go to the iſſue of his daughter, if ſhe had any, yet as he has left out thoſe words the Court cannot ſupply them.

Sed non allocatur; for by THE LORD CHANCELLOR, this cauſe ſeems extremely plain. The teſtator, at the time of making his will, had a wife and a ſon; he deviſes one-third of his eſtate to his wife in fee, and the other two-thirds to his ſon, his heirs and aſſigns for ever. If he had ſtopped here it had been a fee, but he follows it with a clauſe of contingency, *viz.* that in caſe his ſon ſhould die before twenty-one, and without leaving any iſſue behind him, or in caſe ſuch iſſue ſhould die before twenty-one, then to give the remainder to his wife in fee. Upon theſe words of the will there can ariſe no doubt but here is the proper conjunctive *and*; and therefore this clauſe cannot be intended to turn the fee into

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into a tail, but it is an executory deviſe to ariſe upon a contingency; and this contingency being to happen within the compaſs of a life in being, or twenty-one years afterwards, is therefore a good deviſe over. But then comes the codicil, in which, having firſt made a true recital of his will, he then ſays his mind is, that in caſe his ſon ſhould die before twenty-one, or without iſſue as aforeſaid, that the remainder ſhould be to his wife for life, remainder to *Dickenſon*, &c. And it is contended, that by the disjunctive *or* in this codicil it was the teſtator's intention to change that which was but one ſingle contingency in his will into a double or alternative one; that is, that if he died before twenty-one, or if he died without iſſue, in either of theſe caſes the remainder ſhould veſt. But it is my opinion, that the only meaning of the teſtator by his codicil was to alter the remainder, and to carry it over to the family of the *Dickenſons* after the death of his wife, which by his will he had not done. But if there had been no ſuch circumſtance to anſwer the intent of the teſtator, I ſhould have been of opinion, that the word "*or*" muſt be conſtrued "*and*," for the reaſon I mentioned before: and there is a caſe in *Cro. Car.* I think it is *Spalding v. Spalding*, exactly to that purpoſe.

Caſe 152.

Furnivall *againſt* Crew.

April 27, 1744.

In what caſes covenants in a leaſe are to be underſtood as covenants of perpetual renewal, or not.

S. C. 3. Atk. 83.

THIS was a bill brought to inforce the performance of covenants.—*John Crew*, the defendant's grandfather, being ſeiſed of lands in fee in the county of *Cheſter*, by leaſe, bearing date 1682, deviſed the ſame to one *Thomas Moor* upon three lives, reſerving a rent of forty-three pounds eight ſhillings *per annum*, ſubject to heriots, &c.; in which leaſe were theſe two covenants:

COVENANT ON THE PART OF THE LESSEE.

"That he, the ſaid *Thomas Moor*, his executors, adminiſtrators, "and aſſigns, ſhall at the death of any of the lives abovementioned "which ſhall firſt happen, pay unto the ſaid *John Crew*, his heirs "and aſſigns, within twelve months next enſuing ſuch death, the "ſum of ſixty-eight pounds, in the name of a fine, for to add one "other life to the remaining two lives abovementioned, and ſo to "continue the renewing of this leaſe or leaſes, paying as aforeſaid "to the ſaid *John Crew*, his heirs and aſſigns, the ſum of ſixty-"eight pounds for every new life ſo added and renewed as afore-"ſaid, from time to time, according to the true intent and mean-"ing of theſe preſents."

COVENANT ON THE PART OF THE LESSOR.

"That he the ſaid *John Crew*, his heirs, executors, and aſſigns, "ſhall and will, for the conſideration of the ſaid ſum and ſums of "ſixty-eight

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" ſixty-eight pounds as aforeſaid, to be paid to the ſaid *Crew*, his " heirs, executors, or aſſigns, at *Crew Hall* aforeſaid, or at the " place where the ſaid hall now ſtands, ſeal and duly execute one " or more leaſe or leaſes, under the ſame rents and covenants with " theſe preſents, and therein to add ſuch life or lives of ſuch " perſon or perſons as ſhall be then nominated to be added by the " ſaid *Thomas Moor*, his executors, or aſſigns, within the ſpace of " twelve months next after the death of any ſuch life as aforeſaid, " according to the true intent and meaning of theſe preſents."

There was likewiſe another leaſe of lands of leſs value, dated 1681, from the ſame *John Crew* to one ———, in which were inſerted the ſame covenants *mutatis mutandis*. The plaintiff being poſſeſſed of both theſe leaſes, and having upon the dropping of a life in each made application to the defendant to renew, which was refuſed, has now brought his bill in order to have a ſpecific performance of the covenant of renewal contained in theſe two leaſes. That which is inſiſted on by the defendant in his anſwer is, that by the covenant of the anceſtor, *John Crew* the leſſor, he is obliged to renew only upon the death of either of the three lives mentioned in the original leaſe, and not upon the death of any life that has been ſince added; and likewiſe, that he is not obliged to inſert the covenant for renewal in any future leaſes. Which is denied by the plaintiff.

The queſtion for the Court was, Whether theſe covenants are to be underſtood as covenants for perpetual renewal or not? that is, Whether the defendant ſhall be obliged to renew upon the dropping of every added life as well as the original lives? or, Whether it ſhall be confined to a covenant for renewal upon the dropping of each of the firſt three lives which were in being at the time of the original leaſe?

And it was argued by MR. ATTORNEY-GENERAL, MR. CHUTE, and MR. WILBRAHAM, that the plaintiff is entitled to a renewal, and likewiſe to perpetuate this covenant through all future leaſes. Firſt, From the conſtruction of the covenants themſelves. The covenant on the part of the leſſees conſiſts of two branches. The firſt branch extends plainly no further than the firſt renewal; but the additional words in the ſecond branch, " and would ſo continue to renew," &c." mean, that the covenant ſhall be perpetuated. The firſt part of the covenant only ſpecifies the nature of the renewal; the latter part is to continue that renewal through an indefinite time; there are no words which limit when it ſhould determine, either by efflux of time or otherwiſe. The gentlemen, perhaps, may ſay, that by the words " aforeſaid" in the ſecond branch, the intent of the parties is confined and tied down to ſuch renewal as is mentioned in the firſt. But if theſe words are capable of ſuch a ſenſe, they will prove that we have no right to more than one renewal, for the firſt branch is plainly deſcriptive but of one renewal; and if the ſecond gives no greater

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greater latitude, we ſhall not then be intitled to what they themſelves allow we are intitled to, *viz.* a renewal upon the death of each of the firſt three lives. But theſe are not the operate words on which we found our claim; the words on which we inſiſt are, "and ſo continue to renew, &c." In the covenant on the part of the leſſor, the words "at *Crew Hall*, or at the place where the "hall now ſtands," ſhew, that a perpetuity was intended by the parties, and that they calculated for a longer duration than that of three lives. The words "renew under the ſame rents and cove-"nants" muſt mean, that the ſame covenants of renewal, as well as the other covenants, ſhould be continued; and unleſs the ſenſe of theſe words be quite conſtrued away, the plaintiff muſt have judgment in his favour. "After the death of any ſuch life as "aforeſaid," at the latter end of the leſſor's covenant, ought to relate to the immediate antecedent, and not to the firſt branch of the firſt covenant; and the immediate antecedent is an added life; ſo that theſe words amount, in fact, to the ſame as if it had been to renew after the death of any ſuch added life as aforeſaid, which is the conſtruction we contend for. According to their conſtruction, a caſe may happen of abſurdity. Suppoſe upon the dropping of one of the original lives the leſſee ſhould renew, and fill it up with another, and afterwards the new life drops, according to them we are not entitled to a renewal. Suppoſe then, afterwards one of the two remaining lives ſhould fall, then, ſay they, there ariſes a right of renewal: And how ſhall we renew? Shall the leſſee pay a double fine for one renewal? or, Shall the leſſor grant two additional lives upon receipt of a ſingle fine only? Either of theſe would be abſurd, and contrary to the expreſs terms of the covenant. There is a way of conſtruing deeds which is very well known, and very frequently made uſe of in courts of juſtice; and that is, where the parties themſelves, by way of their actions, have ſhewn what was their conſtruction of their own deeds. The conſtruction which is put by thoſe who made the deed does very juſtly influence the conſtruction of the Court. In the preſent caſe, there have been two renewals upon one of the leaſes, and three upon the other; and one of them in each leaſe is founded upon the ſuppoſition which we contend for, *viz.* upon the death of an added life; and in every leaſe which has been renewed, the covenant for renewal has been inſerted in the very ſame words with that in the original leaſe. This ſhews clearly, that it was the opinion of the defendant's anceſtors, that the covenant in the original leaſe was a covenant for a perpetual renewal. And on our ſide likewiſe the words were underſtood in the ſame ſenſe; for we ſhall ſhew, that we have gone on in making very great improvements on the premiſes in contemplation of the leaſe being perpetually renewable. The caſe of *Bridges v. Hitchcock*, the twenty-fourth of *June* 1715, is in point to the preſent purpoſe. That was, a leaſe of certain mills from *Bridges* to *Hitchcock* for twenty-one years, with a covenant, that upon requeſt of the leſſee ſix months before the expiration of the ſaid term the leaſe ſhould be renewed in what manner ſoever he ſhould

1. Brown Caſes in Parl. 522.

ſhould deſire, but upon the ſame rent and covenants with the preſent. The leſſee applied accordingly ſix months before the term expired, but the leſſor refuſed to inſert the ſame covenant of renewal in the new leaſe. Upon a bill brought in the exchequer the Court determined, that the leſſor ſhould renew with a new covenant of renewal; and this was afterwards affirmed in the Houſe of Lords. In this caſe there were no other words to found the determination upon, but merely the words "upon the ſame rents and covenants." There were no words to ſhew, that the parties had more than one renewal in view. Beſides, the covenant there was not mutual; there was no covenant on the part of the leſſee to accept: ſo that in that they went further than a court of equity will ſometimes do. That caſe is therefore ſtronger in every reſpect than the preſent, and is in point to ſhew, that where there is a covenant to renew with the ſame covenant, *that* extends to a renewing or perpetuating the covenant of renewal. Though the preſent caſe is not worded quite ſo properly as it might be in order to conſtitute a perpetual covenant, yet it is much more improper for the conſtruction which they contend for. An implicit covenant of renewal is as good as an explicit one. He does not covenant to renew *in perpetuum*, but he covenants to renew with the ſame covenants, which is implicitly a covenant to renew perpetually. Leaſes of this ſort for three lives are become a ſort of tenure in the country; and it is a diſcredit to the lord not to accept his tenant when he comes with his money in his hands. No argument ought to be drawn from its proving a beneficial bargain to the leſſee; for if the lands had grown worſe, if they had been overflown by the ſea, or the rents had ſunk by the loſs of trade in a town, or by any other accident, the leſſee had been obliged to pay the ſixty-eight pounds, and therefore the remedy ought to be mutual. At the time the leaſe was made, it might have proved for the benefit of the one or of the other, *non conſtat* which; and therefore no concluſion ſhould be drawn from thence.

MR. SOLICITOR-GENERAL, MR. BROWN, and MR. FENWICK, *for the defendants*. The queſtion for the determination of the Court ariſes upon the conſtruction of a covenant contained in two leaſes; one dated 1681, the other 1682. In the year 1682, ſubſequent to the firſt leaſe and precedent to the ſecond, a ſettlement was made between *Crew* the leſſor and truſtees, whereby all his lands in *Cheſter* (amongſt which are the premiſes in queſtion) were ſettled to the uſe of himſelf for life, remainder to his firſt, &c. ſons in tail, remainder over to every perſon who ſhould claim under that ſettlement, to make leaſes for three lives, ſuch as are allowed by the ſtatute of *Henry the Seventh*, and no other. As this was a voluntary ſettlement, and not in our power to ſhew any conſideration, the uſe we ſhall make of it will not be to defeat the leaſe by ſetting up a prior diſpoſition of the premiſes by the leſſor, but to ſhew, that if the covenant in the original leaſe was not a perpetual covenant, we are not bound by any covenants contained in ſubſequent renewals, they being all made by perſons who

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who by this ſettlement are reſtrained from granting any other leaſes than ſuch as are allowed by the ſtatute of *Henry the Seventh*. The general queſtion is, Whether theſe covenants are to be underſtood as covenants for perpetual renewal? Before we enter into the merits, we ſhall make one or two introductory obſervations. The perpetual covenants are not contrary to the law of *England*, yet they are ſo very rarely made uſe of that no argument can be drawn from, or reverence had to, the cuſtom of the country, in order to explain the words of the covenant. In *Ireland*, covenants of this nature are extremely frequent, and there reference is had to the cuſtom of the country, which generally greatly influences the judgment of the Court, *Lord Saley v. Wheeler*. The conſideration-money will deſerve the notice of the Court; for if the conſtruction of the covenants ſhould be doubtful in other reſpects, the Court will judge by the conſideration-money what was intended to be purchaſed; and if the conſideration be adequate to a perpetual renewal, that will turn the conſtruction one way; if it be hardly equal to what one would give for that limited renewal which we contend for, that will turn the queſtion the other way. In the preſent caſe, the conſideration is by no means adequate. The annual value of the eſtate is ſeventy pounds *per annum*; it never was leſs than fifty-five pounds; and the fine to be paid is no more than ſixty eight pounds; whereas fines of this ſort are never leſs than from two to three years purchaſe. The intent of the original leſſor may be collected from the ſettlement which he made immediately precedent to one of the leaſes in queſtion. He thereby reſtrains all thoſe who ſhould come in after him from making any other leaſes than ſuch as were allowed by the ſtatute of *Henry the Seventh*; and, Can it be ſaid, that it was his intent to make a covenant which ſhould oblige all thoſe who were to repreſent and follow him for ever, to renew and perpetuate the covenant of renewal, when he himſelf had by his own act incapacitated them from perpetuating ſuch a covenant? There are ſeveral covenants in this leaſe to oblige the tenants to repair; and from hence likewiſe may be inferred, that no perpetual renewal was intended; for ſuch covenants had been unneceſſary in behalf of the leſſor, if it was the intent of the parties that the leſſee, upon paying a certain fine, might perpetuate the eſtate to himſelf. But conſider the words of the covenant. The ſecond branch of the covenant on the part of the leſſee cannot be taken as a diſtinct clauſe, which the gentlemen have done, for it can ſignify nothing by itſelf, and is therefore tied down by words of reference to the firſt clauſe: and the firſt clauſe ſays expreſsly, "the lives above mentioned;" which words plainly relate to the lives then in being, and no other: no mention is made of any lives that ſhall hereafter be added. The words of the leſſor's covenant, which have been ſo much inſiſted on, "under the ſame rents and covenants," are deſigned for the benefit of the leſſor, and mean only that the leſſee ſhall not compel him to renew, but under the ſame reſtrictions as were in the then ſubſiſting leaſe; they can never be conſtrued to extend the power of renewals

renewals ſince the death of the original leſſee; for if the covenant in the original leaſe will not do their buſineſs, the continuation of it never can do. Beſides, the ſettlement prevents any of the ſubſequent covenants from operating otherwiſe than under the ſtatute of *Henry the Seventh*: therefore the whole muſt depend upon the original covenant; and if that be not ſufficient, the reſt muſt entirely fail. The caſe of *Bridges v. Hitchcock*, which has been cited, was very particularly circumſtanced: That was a leaſe of ſeveral old decayed mills for twenty-one years, which were to be pulled down and rebuilt in order to ſet up a trade in braſs and iron; very great hazards were run, and very great expence incurred, in ſetting up a manufactory: there was an expreſs covenant that upon notice of ſix months the leaſe ſhould be renewed; the leſſee had laid out a groſs ſum of one thouſand eight hundred pounds upon forty pounds a-year, and had, with this great expence, eſtabliſhed a trade, which he could not have done but in contemplation of having his leaſe renewed. The original intent was, that it ſhould not ſtop at the end of the firſt twenty-one years. But whether the Houſe of Lords would decree a renewal in a third inſtance, that is, after the expiration of the third leaſe, which the leſſor by his ſecond had covenanted that he would afterwards grant, *non conſtat*. It is not there decreed that this covenant of renewal ſhall be inſerted for ever through all future leaſes. In the caſe of *Doctors Commons v. the Dean and Chapter of St. Paul's*, a leaſe was made for ninety-nine years, with a covenant of renewal, "under all and ſingular the ſame rents, covenants, and "conditions," upon expiration of the leaſe. *Doctors Commons* brought a bill for renewal. To which the Dean and Chapter anſwered, that they were diſabled by the ſtatute, which had been made ſince the leaſe was granted, and that they had now no power to leaſe for more than three lives, or twenty-one years. But it was inſiſted, that at the time of making the firſt leaſe they were at full liberty, and that that covenant being before the ſtatute was binding to them. The opinion of this Court and of the Houſe of Lords was, that the Dean and Chapter ſhould be obliged to renew for forty years, and there it was to end. This plainly ſhews, that it was the opinion of the Houſe, that the original covenant ſhould not be conſtrued a covenant for perpetual renewal, becauſe as the Dean and Chapter were, at the time of making the covenant, unreſtrained by any ſtatute, and therefore had it in their power to make a perpetual covenant, if they had done ſo it would have been binding, notwithſtanding the ſubſequent ſtatute. They cited alſo the caſe of *Hyde v. Skinner*, *Peer. Wms.* 196.

Upon the whole they ſubmitted, that the words of the covenant would be fulfilled and ſatisfied by the conſtruction which was contended for; and that by the words, *upon the death of any of the lives abovementioned*, the renewal was expreſsly tied down to the expiration of the lives then in being.

MR. ATTORNEY GENERAL'S *reply*. It has been inſiſted, that the fine to be paid is not adequate to the value of the fine for per-

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petual renewal in proportion to the value of the eſtate. But it is impoſſible to judge at this day whether the fine was adequate or not at that time. The Court muſt firſt enquire, What were the general purchaſes of eſtates at that time? What was the annual value of this eſtate at that time? How it has been improved ſince, &c. The value of land is increaſed, the intereſt of money leſſened, ſince this leaſe was made, and therefore it is impoſſible to found any judgment upon this matter. As to the merits of the caſe, and the words of the covenant, it is plain that the firſt part of the covenant relates only to one renewal; if it ſtood upon the part of the covenant, we could not be intitled to ſo much as the gentlemen themſelves allow us; and they draw all their arguments from that branch of the covenant; which, if their arguments are concluſive, does reſtrain us from doing what even themſelves allow us a right of doing. The words "renew ſuch leaſe or leaſes" are inconſiſtent with their conſtruction; for if an added life ſhould drop, they plainly ſignify that the leaſe ſhall be renewed upon ſuch death. The fixing upon *Crew Hall*, or the place where it now ſtands, as the place of payment, ſhews the parties to have a perpetuity in view, and ſhews likewiſe great accuracy in them in ſettling the place where the money ſhould be paid, to prevent the diſputes which might ariſe during a perpetual renewal. In the caſe of *Hyde v. Skinner*, 1. *Peer. Wms.* 196. the circumſtances are very uncommon; and LORD MACCLESFIELD ſeems to have been under great difficulty to ſplit the difference between the parties; and no judgment ought to be deduced from ſuch a caſe, which is rather a matter of arbitration than otherwiſe.

HARDWICKE, *Lord Chancellor*, after argument by Counſel, and time taken to conſider of this caſe, delivered himſelf to this effect: The original bill is to have the benefit of the covenants in two leaſes made by *Mr. Crew*, the grandfather of the defendant, for three lives each of them, and to have theſe leaſes renewed purſuant to the true intention of the covenants, and to have a ſpecific performance of them.

That leaſe which is the firſt in point of time is of the eſtate called *Sandback*, made in 1681 to *Thomas Moore* for three lives; the other leaſe was made the twenty-fourth of *October* 1682 of an eſtate called *Elton* to *Cooper* for three lives alſo. In each of theſe leaſes are covenants penned exactly in the ſame words; and the firſt covenant is on the part of the leſſee, and the ſecond is on the part of the leſſor. Firſt, The leſſee, *Thomas Moore*, covenants, "for "himſelf, his executors, adminiſtrators, and aſſigns, with *John* "*Crew*, his heirs and aſſigns, that the ſaid *Moore*, his executors, "adminiſtrators, and aſſigns, or ſome of them, ſhall at the death of "any of the lives aforementioned, which ſhall firſt happen, pay "unto the ſaid *Crew*, his heirs or aſſigns, within twelve months "next enſuing ſuch death, the ſum of ſixty-eight pounds, in the "name of a fine, to add one other life to the other remaining two "lives abovementioned, and ſo to continue the renewing of the

"leaſe

" leaſe or leaſes, paying as aforeſaid, from time to time, according " to the true intent and meaning of theſe preſents." This is the whole of the covenant in each leaſe of the part of the leſſee. Then follows a covenant on the part of the leſſor, who " for " himſelf, his heirs, and aſſigns, covenants and agrees to and with " the ſaid *Moore*, his executors and aſſigns, that he the ſaid *Crew*, " his heirs, executors, and aſſigns, ſhall and will, for the conſider- " ation of the ſaid ſum and ſums of ſixty-eight pounds as aforeſaid " to be paid to the ſaid *Crew*, his heirs or aſſigns, at *Crew Hall* " as aforeſaid, or at the place where the ſaid hall now ſtandeth, " ſeal and duly execute one or more leaſe or leaſes under the ſame " rents and covenants with theſe preſents, and therein to add ſuch " life or lives of ſuch perſon or perſons as ſhall then, and at ſuch " time, be nominated to be added by the ſaid *Moore*, his executors " or aſſigns, within the term or ſpace of twelve months next after " the death of any ſuch life as aforeſaid, according to the true intent " and meaning of theſe preſents."

The covenants are penned in the ſame words in both leaſes, and therefore there can be no difference in this conſtruction of them. The fines are different by reaſon of the different values of the eſtates. There is one circumſtance in which the leaſes differ, but it will not influence the determination of the caſe; that is this: The leaſe in 1681 was made at a time when *Mr. Crew* was ſeiſed in fee, but the leaſe in 1682 was made at a time ſubſequent to a voluntary ſettlement made by the leſſor, by which he made himſelf tenant for life, with remainder to his daughter for life, with remainder to her firſt and every other ſon in tail, &c. whoſe firſt ſon the defendant is. But that does not differ the equity of the plaintiff on that leaſe, becauſe as the plaintiff claims for valuable conſideration, and the ſettlement is voluntary, the leſſee will be conſidered as a purchaſor of the leaſe, and will prevail againſt the voluntary ſettlement; and the covenants will bind the land if the plaintiff be entitled to the equity he inſiſts on.

The facts which have happened under the two leaſes are, that none of the lives dropped during the life of the leſſor; but after his death lives dropped, and there have been two renewals of each leaſe: one of them by the defendant's father and mother, and the other of them by his mother after the death of her huſband; and in all four of theſe renewed lives the ſame covenants for renewals *in hæc verba* have been inſerted as are in the original leaſe. It has happened ſince, that in one of the leaſes all the old *ceſtui que vies* in the original leaſe are dead; and in one of the leaſes the renewal that is aſked is on the death of a new life, and not on the death of any of the old lives in the original leaſe. On the other of the leaſes it has happened, that the death on which the renewal is now prayed is the death of the laſt *ceſtui que vie* in the original leaſe, and therefore as to that it is admitted, that the plaintiff is entitled to have a renewal of that leaſe; and the only queſtion between the parties is, what are to be the terms of that renewal, *viz.* Whether

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the plaintiff is intitled to have this leaſe renewed with a like covenant of renewal as was in the original leaſe?

The firſt material conſideration is the true conſtruction of theſe two covenants: and the queſtion upon them will be, Whether the obligation on the part of the leſſee to pay or tender the fine, and the obligation on the leſſor to renew the leaſe, was to ariſe barely on the death of any of the lives which were the *ceſtui que vies*? And I am of opinion, that by the true conſtruction of thoſe covenants the plaintiff is intitled to have a new leaſe with the ſame covenants of renewal; and that this was deſigned to be a continual perpetual leaſe. This depends on the conſtruction of the words of the covenant, and on what appears to have been the intention of the parties. The covenant on the part of the leſſee is, "that he, his executors, &c. ſhall, at the death of any of the "lives aforementioned, which ſhall firſt happen, pay unto the "leſſor, his heirs and aſſigns, ſixty-eight pounds as a fine, to add "one life to the other two remaining lives." It has been inſiſted on for the defendant, that this firſt branch of this covenant is confined to the firſt life which ſhould drop of the lives in the original leaſe; and ſo it is: but however that does not influence the conſtruction of the whole covenant, becauſe it was admitted on the part of the defendant, that notwithſtanding theſe words are ſo confined to the dropping of the firſt life of the three *ceſtui que vies* in the original leaſe, the plaintiff would be entitled to have a renewal. But then what can be the meaning of theſe words, "and ſo to "continue the renewing this leaſe or leaſes, paying as aforeſaid to "the ſaid leſſor, his heirs or aſſigns, the ſum of ſixty-eight pounds "for every life ſo added or renewed as aforeſaid from time to time, "&c." It was inſiſted on for the defendant, that this means only the continuing or renewing the leaſe by adding a new life on the death of any one of the lives in the original leaſe, and not to add a new life on the former new added lives; and that that will ſatisfy the words of the covenant. But however by any narrow conſtruction it might be ſaid to ſatisfy the words, yet I think it would not ſatisfy the true conſtruction of the covenants. The words "ſo to continue the renewing this leaſe or leaſes" does not mean only "to add new lives on the death of any of the *ceſtui que vies*," but the continuing the eſtate and filling or keeping up the number of lives, for that is what in common expreſſion is meant by continuing a leaſe. But there is ſomething more to ſhew this to be the conſtruction; for it is not only "to continue the renewing this "leaſe," but "this leaſe or leaſes;" and the word "or" muſt receive the ſame conſtruction as the word "and;" for undoubtedly that muſt be admitted on the part of the defendant, that "the renewing this leaſe or leaſes" muſt mean the renewing ſome new-granted leaſe. Suppoſe one of the lives in the original leaſe dies, no new life can be added by granting a ſeparate leaſe, but the leaſe muſt be renewed for the two lives remaining and a new added life; or ſuppoſe another life dies, Muſt not that be renewed? Undoubtedly it muſt; and therefore the words "leaſe or leaſes"

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muſt be admitted to comprehend ſome new leaſe. And if ſo, Where will you ſtop? If it is ſo comprehended, ſome new leaſe to be made by virtue of theſe covenants, why will it not comprehend the laſt leaſe which ſhall be granted on the death of the laſt *ceſtui que vie* in the original leaſe? And if it will comprehend it, then this is a covenant not only to renew the preſent leaſe, but all others which ſhall be made purſuant to theſe covenants, if this be the true conſtruction of the covenants on the part of the leſſee.

And the next conſideration is, the true conſtruction of the covenants on the part of the leſſor. And he covenants, that "he, "his heirs, executors, and aſſigns, ſhall and will, for the conſider- "ation of the ſaid ſum of ſixty-eight pounds as aforeſaid to be "paid to the leſſor, his heirs or aſſigns, at *Crew Hall* aforeſaid, "or at the place where the ſaid hall now ſtands, ſeal and duly "execute one or more leaſe or leaſes under the ſame rents and "covenants with theſe preſents, and therein to add ſuch life or "lives of ſuch perſon or perſons as ſhall then, and at ſuch time, be "nominated to be added by the leſſee, his executors or aſſigns, "within the ſpace of twelve months next after the death of any "ſuch life as aforeſaid." Here is a covenant from the leſſor to grant "a new leaſe under the ſame rent and covenants with theſe "preſents," which undoubtedly take in the covenant for renewal. It has, however, been inſiſted on for the defendant, that "any "ſuch life as aforeſaid" means the lives in the original leaſe. But there are no words to continue it to them, and I think it means any of the lives before deſcribed: for it is not ſaid, that the leſſor ſhall add ſuch life to the two remaining lives, as it is in the covenant on the part of the leſſee; but it is general, that he ſhould grant an eſtate "for the life of ſuch perſon as ſhall be nominated "to be added, within a year after the death of any ſuch life as "aforeſaid." What is "any ſuch life as aforeſaid?" It is large and comprehenſive enough to take in as well the added as the original life, for both of them are mentioned before.

There are two circumſtances in the covenants which favour this conſtruction for the plaintiff: One of them is, that the leſſor covenants to renew the leaſe on payment of the fine, &c. at *Crew Hall*, or at the place where *Crew Hall* now ſtands. Perhaps much weight is not to be laid on this; but yet I do not think, that the drawer of the leaſe would imagine that *Crew Hall* would be demoliſhed in the compaſs of three lives: I dare ſay this family had not that opinion of it.

The other circumſtance is of more weight, that in the way the defendant contends for the renewal of this leaſe, there never was an inſtance in this kingdom, or in any other, of any tenant's contracting for ſuch a leaſe, the terms of it being the moſt diſadvantageous that can be on the part of the tenant. It is natural that a man ſhould contract for a perpetual renewal; but they ſay, he did not do that, but only for two leaſes for three lives; but for ſuch a leaſe only no man would contract in this way, that on the death of

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any one life he ſhould be bound to pay his fine, and then if the new life dropped he ſhould have no renewal, but it ſhould remain on the old lives, for if one of the old lives dropped he ſhould have a renewal. In this way the tenant muſt pay two fines for the renewal of his leaſe, and yet the whole leaſe determine on the death of the laſt life originally granted. That is very natural, if a man intended to have a perpetual renewal; but it is not at all natural if he contracted only for two lives leaſes; but the natural way to have contracted for two leaſes for three lives would be to have the ſecond leaſe ariſe on the determination of the firſt.

The next thing which deſerves to be conſidered is, what has been objected on the part of the defendant, that no breach could be aſſigned at law in any action of covenant againſt the heirs at law or executors of the leſſor. But I am of opinion, that if this be the true conſtruction of the covenant, that at law a breach might be aſſigned upon it, and that on the words "ſo to continue the "renewing this leaſe or leaſes, paying as aforeſaid ſixty-eight "pounds for every life ſo added;" for if this means to contract the renewing every further or future life, then the not paying or tendering the money would be a breach of the covenants on the part of the tenant; and if an action was brought by the leſſee, a breach muſt be aſſigned by not granting a leaſe under the ſame covenants "on the death of any ſuch life," which I think means, "any life "abovementioned;" and agrees the two covenants muſt be commenſurate or co-extenſive with each other.

But if a breach might be aſſigned at law by either of the parties, the queſtion will be, Whether this is a proper caſe for relief in equity? And I think it very proper on two reaſons: the one from the nature of the covenants; the other from the condition of the perſons ſeeking the benefit of theſe covenants. Firſt, From the nature of the covenants. It is to make an eſtate in land, and conſequently is one of the moſt proper caſes that can be for equity to interpoſe in by way of ſpecific performance, becauſe this Court can give the eſtate itſelf; but at law nothing can be recovered but damages; and therefore the relief here is higher and more adequate than at law. Secondly, In reſpect to the condition of the perſons for theſe reaſons: If an action was brought at law, it could only be againſt the executor or adminiſtrator of the original leſſor, or againſt his heir at law, if he has aſſets; the defendant is his heir at law; but perhaps he has no aſſets, becauſe the whole eſtate was ſettled; and if this were the caſe, then the repreſentatives ought to recover againſt the heir at law out of real aſſets deſcended, when in equity this is a covenant which binds the land and goes along with it; and therefore this Court gives relief againſt the proper perſon who is in poſſeſſion of this eſtate attended with this lien upon it; whereas at law ſatisfaction would be recovered againſt him who in mere equity and juſtice is not the perſon who ought to make it.

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It was inſiſted for the defendant, that theſe covenants of perpetual renewals are not to be favoured, becauſe they take the eſtate from the owner of the inheritance. This may be in part true, but, however, contracts for valuable conſideration muſt be performed. The original leſſor might have granted the whole fee, or have charged it in ſuch manner as he pleaſed: and the only queſtion is, Whether he has done it? If he has, it ought to be ſupported?

There are ſeveral inſtances wherein this Court has decreed perpetual renewals *are not to be*. But it is objected, that the fines given by the tenant are not adequate, and that that is ſuch an ingredient in the caſe as will induce the Court not to decree a ſpecific performance. But on the evidence nothing exceſſive or very diſadvantageous to either party has appeared; but it is a much more favourable caſe than ſome of thoſe in which moſt ſuch renewals have been decreed. In the caſe of *Hyde v. Skinner*, 2. *Weſtm.* 196. though the Court did not decree a perpetual renewal, yet they decreed a new leaſe, and that notwithſtanding the original leaſe had been once renewed; and yet neither in the caſe of *Bridges v. Hitchcock*, in the Houſe of Lords, 1715, was there any fine to be paid upon the renewal, as there is in the preſent caſe, and that a very large one of ſixty-eight pounds for every renewal of one of the leaſes, and for the other, wherein the leſſor has taken care that his ſucceſſors in the eſtate ſhall have a conſideration paid on every renewal; which makes it a much more favourable caſe than where it is to be without any fine.

Another objection was, that the plaintiff aſked a renewal of this leaſe with the like covenants of renewal as in the other leaſe; and that cannot be; and that it muſt have been in proſpect of the parties that the ſucceſſors in the eſtate muſt not be in a condition of giving ſuch an eſtate, or of laying their heirs under an obligation to do a thing which, from the nature of their eſtate, they could not. But in anſwer to this it was rightly ſaid at Bar, that when ſuch renewals are made they ariſe out of the original covenant given by the firſt leſſor, who had power to bind the land, and theſe covenants run along with it. And I do not imagine that the covenants are agreeable to the nature of this eſtate: and the Court will not decree him to enter into any covenant farther than his eſtate goes. It would be unreaſonable, that the defendant, who is but tenant for life, ſhould covenant that he and his heirs will from time to time renew this leaſe, but he ſhall covenant that he and all claiming under him ſhall renew it; and the original leaſe ſhall be depoſited with the Maſter, ſo that it may appear on what foundation it is ſubſiſting. Another fact in this caſe is, that there have been two renewals of theſe leaſes; one by the father and mother of the preſent defendant, and the other by his mother; and thoſe have been each of them with covenants in the ſame words as theſe in the original leaſe, though the leſſors who renewed were but tenants for life. That was an inaccuracy; but notwithſtanding that, and though the defendant is not bound by it, yet it ſhews what was the

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ſenſe of the family; for though theſe renewals were only on the dropping of the lives in the original leaſe, yet the giving ſuch a covenant for renewal ſhews their apprehenſion to be that it was a covenant for a perpetual renewal.

The authorities which have been cited are but few, and do not come up to the preſent caſes. One was the caſe of *Doctors Commons v. the Dean and Chapter of St. Paul's:* A leaſe was made on *February* 2, 1567, for ninety-nine years, before the diſabling ſtatute of *Elizabeth*, in which was a covenant, "that if the leſſees "or their ſucceſſors ſhould, at any time during the ninety-nine "years, ſurrender the ſaid leaſe, that on requeſt the Dean and "Chapter, the leſſors, or their ſucceſſors, ſhould grant another new "leaſe of the premiſes for the fine of twenty pounds for a number "of ſo many years, and with all and ſingular ſuch covenants and "conditions contained in the original leaſe." After this the ſtatute 13. *Eliz.* c. 18. enacts, that "all leaſes by bodies corporate "for a longer term than twenty-one years, or three lives, ſhall be "void." A bill was brought in chancery *for a term of forty years* againſt the Dean and Chapter to have a renewal of this leaſe on the ſame terms and covenants as are in the original leaſe. But the Houſe of Lords decreed the leaſe to be made by the Dean and Chapter for a term of forty years, agreeable to the power they have in 14. *Eliz.* c. 11. "Cities and Market-towns," but without any covenant for renewing again. That was on a particular reaſon, that by ſome of the reſtraining ſtatutes theſe bodies corporate are reſtrained from giving bonds or covenants in conſideration to the ſtatutes that reſtrain leaſes, becauſe that was one way of evading theſe ſtatutes; and therefore the latter reſtraining ſtatutes have made theſe bonds and covenants void: therefore the Houſe of Lords would not decree new covenants, which would have been void, and contrary to the ſtatutes.

As to the caſe of *Hyde v. Skinner* (*a*), cited for the defendant, that cannot be made uſe of as an authority in this caſe, nor indeed can it hardly be made uſe of as an authority in any. There the leaſe was for five years, with a covenant to renew, without any fine to be paid on the renewal of the ſame rents and covenants, and for ſuch term as the leſſee ſhould deſire; the adminiſtrators of the leſſee demanded a leaſe for fifty years on the general words of the covenant; and LORD MACCLESFIELD was of opinion, that there ſhould be a renewal, but not for ſo long a term, and therefore decreed a leaſe for twenty one years. On the generality of the words of the covenant there was no ground to refuſe the plaintiff the term of years which he aſked, and there is nothing which appears to reduce it to any other term but the original leaſe, and that was for five years, for which term alſo it had been once renewed; and therefore this is rather a compromiſe than a decree.

(*a*) 2. Peer Wms. 196.—See alſo Ruſſell *v.* Darvin, 2. Brown's C. C. 639. *note.* Cook *v.* Booth, Cowp. 819. and Tritton *v.* Foote, 2. Bro. C. C. 636.

The

The caſe of *Bridges v. Hitchcock*, decreed in the Houſe of Lords *June* 24, 1715, comes nearer to the preſent caſe than any that has been cited. In that caſe the covenant was, that if the leſſee, his executors, adminiſtrators, or aſſigns, ſhould, at any time thereafter, be minded to renew and take a further leaſe of the premiſes, that on application made before the laſt ſix months of the term the leſſor, his heirs or aſſigns, ſhould grant ſuch further leaſe as ſhould be deſired by the leſſee, his executors or adminiſtrators, without any fine, and under the ſame rents and covenants, &c.; a bill was brought for the renewal; and the queſtion was, Whether it ſhould be a renewal with an inſertion of a covenant to renew? or, Whether the words, "under the ſame rents and "covenants," ſhould not be confined to the ordinary covenants of payment of the rent, repairs, or the like? And the Exchequer directed a new leaſe to be made with the ſame covenant for a renewal which was in the former leaſe; and that decree was affirmed in the Houſe of Lords. That caſe was liable to more objections than the preſent, becauſe there was nothing but a covenant on the part of the leſſor, and none on the part of the leſſee; and therefore it would be reaſonably ſaid, that "the ſame rents and "covenants" mean the common covenants attendant on leaſes, and not to take in the covenant for a renewal. In the preſent caſe there are mutual covenants; the leſſee covenants to pay his fine, and the time and place for payment of it are aſcertained: but in the caſe of *Bridges v. Hitchcock* no fine was to be paid on the renewal. But it was argued for the defendant, that in that caſe there ſhould have been great improvements, and that it was conſidered as a building-leaſe; and no doubt but that had great force in the caſe: but yet that reaſoning does not extend ſo far as the decree went; if they had built on that only, they might have granted another term for twenty-one years, and that would have been thought a very reaſonable ſatisfaction for the improvements: conſequently the argument drawn from the improvements could not be that on which the decree was founded, which was by a perpetual renewal; and therefore it muſt reſt on the conſtruction of the words of the covenant.

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Agreeably to this authority, and the conſtruction of the covenants, I MUST DECREE a renewal of theſe leaſes under the ſame rents and covenants that are in the original leaſes; but theſe covenants muſt be reduced to ſuch as the defendant, from the nature of his eſtate, can enter into.

Gibblett *againſt* Read. Caſe 153.

In Chancery, Eaſter Term, 17. Geo. 2.

THIS BILL was brought by all the children of the late *James Read*, printer of the *St. James's Evening Poſt*, againſt his widow and executrix. The plaintiffs claimed under the will and cuſtom of *London*.

A ſhare in a *newſpaper* ſhall be conſidered as the perſonal property of the proprietor, and the profits of printing the ſame ſubſequent to his death be diſtributed accordingly.

And

GIBBETT *againſt* READ.

And the ſingle queſtion was, Whether or no nineteen ſhares out of twenty of the profits of printing that paper ſubſequent to the teſtator's death were part of the ſaid teſtator's perſonal eſtate, and as ſuch to be accounted for by the defendant?

HARDWICKE, *Lord Chancellor.* It is a very clear caſe; and though it may be difficult to define the various natures of property, yet it may, notwithſtanding, be tranſmiſſable to repreſentatives. And I am of opinion that this is ſo; and if the bill had been by creditors, there would have been no diſpute. *James Read*, the father, appears to have purchaſed his ſeveral ſhares in this paper from ſeveral ſharers or partners. It is proved, that ſhares in the printing of newſpapers are valuable, and that the repreſentatives of ſome of theſe ſharers have taken them as part of the perſonal eſtate of the partner, and that the teſtator *Read* purchaſed of ſuch repreſentatives. All things of this ſort ought to be taken according to the known nature of the dealing, and the method of the parties conſidering theſe matters and carrying them on. *Lintot* had a one twentieth ſhare of this paper; and the defendant continues it for ſix months after her huſband's death, and accounts with *Lintot*.

There are many caſes where no part of the profit of a teſtator has been employed or made uſe of in carrying on the buſineſs, and yet the executor has been accountable for the profits of the buſineſs as the teſtator's perſonal eſtate. The caſe put of phyſical ſecrets or noſtrums, where every thing was carried on by the materials purchaſed after the teſtator's death, and yet the noſtrum is part of the perſonal eſtate of the teſtator. This has been reſembled to the caſe of a ſhoemaker: and in that caſe, Suppoſe the dealing has been extenſive, and carried on in partnerſhip, and with the father's ſtock, the ſon, who is executor, would be accountable. Suppoſe the houſe were a houſe of great trade, he muſt account for the value of what is called the good-will of it. Could not the defendant have ſold theſe ſhares? Did not *Walker's* repreſentatives ſell them? Could not the huſband have given them by will? and if he had, Would ſhe not have been accountable? As to the argument, that others might have printed it as well as *James Read* or the defendants; ſo in the caſe of *Tipping*, if anybody had thought of his noſtrum, as he had no patent, any diſcoverer might have ſold it. But what is ſtrong here is, its having been in partnerſhip; and being ſo, there is a ſort of ſecret in the buſineſs, and a certain expence in procuring intelligence. And it would be a deceit and a fraud on the parties if this Court did not conſider things on the ſame foot as purchaſers of a thing of this ſort did. I am clearly therefore of opinion, that *Mrs. Read* muſt be accountable for the profits of this paper. And the only queſtion is, How? For I go on this foot, that it was a valuable thing at the teſtator's death; ſhe might have ſold it, and ought to have ſold it; and then all the loſſes to which it is ſaid thoſe matters are liable would have been prevented; and the beſt method ſeems to me, for the Maſter to ſet a value on thoſe ſhares at the teſtator's death, and the

defendants

defendants to account with the plaintiffs for the principal, with intereſt for the ſame at five *per cent.* from the teſtator's death.

GIBBETT *againſt* REAR.

Jones *againſt* Legg *(a)*.

Caſe 154.

In Chancery, February 1, 1743.

ROBERT LEGG deviſed a houſe to his daughter *Marthana Legg* for her natural life; and after her deceaſe he willed, that the ſame ſhould go to and be enjoyed by the children of her body lawfully to be begotten, if ſhe ſhould have any, and their heirs; and in default thereof he limits the ſame over to his ſon *William Legg*, and his heirs and aſſigns for ever. The teſtator left ſix children, *John*, *Robert*, *William*, *Marthana*, *Elizabeth* the plaintiff, and *Anne*.—*William Legg* deviſed his reverſion expectant upon the death of *Marthana* to his brother *John* and his heirs, upon truſt to ſell and divide the money ariſing therefrom between himſelf and *Elizabeth*. *William* died in the life-time of *Marthana*. *Marthana*, is ſince dead without iſſue. The plaintiff *Elizabeth* claims under *William*'s will. *Robert*, the grandſon and heir at law of the teſtator and *Marthana*, inſiſts, that the deviſe to the children of *Marthana* and their heirs was a fee, and that the remainder to *William* was not deviſable by him, he having only a contingent intereſt, and not deviſable in the life-time of *Marthana*.

HARDWICKE, *Lord Chancellor*. The queſtion is, Whether the remainder to *William* is to be conſidered as *veſted* or *void*, or as a *contingent remainder*? And in order to make *William*'s deviſe good, it muſt be a veſted remainder. And I think, *Marthana* took no eſtate-tail; it is given her expreſsly for life; and therefore no greater eſtate ſhall ariſe by implication: for though a deviſe "to *A.* and his children," or "to *A.* and after his death to his "children," will give *A.* an eſtate-tail if he has no children, according to *Wild's Caſe*, 6. *Co.* yet in this caſe there are words of contingency, "if he have any children," which differs the caſe from *Wild's Caſe*. And there does not appear to have been any intention which would be fulfilled by over-ruling the eſtate for life.

THE SECOND QUESTION is, What eſtate the children of *Marthana* would have taken, whether an eſtate-tail or in fee? And to determine that queſtion, the ſubſequent words, "in "default thereof," muſt be taken into conſideration. If no remainder had been limited over, it would certainly have been a contingent remainder in fee to the children of *Marthana*; and ſo it would have been if *William* was a ſtranger; but *William* muſt have been uncle of the children if there had been any living;

(*a*) The following caſes in this volume were kindly communicated to the Editor by CHARLES BUTLER, Eſq. of *Lincoln's-Inn*.

and

Jones against Legg.

and therefore, leaving *William* or any of his heirs, the children could not die without heirs; which turns the conſtruction of the word "heirs" into "heirs of their bodies." The doubt ariſes upon an equivalent ſenſe of the words, "in default thereof," if they ſhall relate to the children or the heirs of children. If they are to be conſidered as relative to the children, I admit it would come to the caſe of *Loddington v. Kime*, 1. *Salk.* T. deviſes, &c. which is not a fee mounted upon a fee, but a fee with a double aſpect, and to ariſe to the one or the other as the contingency ſhall happen; and both the remainders are contingent; but that caſe is anomalous, and to ſet over a rule of law that one fee cannot be mounted upon another; and ſuch a conſtruction ought never to be made without an abſolute neceſſity, as there was in that caſe; but in the preſent caſe I am not bound to make ſuch a conſtruction. It is inſiſted for the plaintiff, that the words "in "default thereof" relate to the next antecedent word "heirs." And it is inſiſted for the defendant, that they are to be applied to the more remote correlate children. But I think both the contingencies are too narrow, and that the words take in both the conſtructions in the preſent caſe; and that brings it to the common caſe, in all marriage-ſettlements of limitations to the father for life, to his firſt and every other ſon in tail, remainder to daughters in tail, and for want of ſuch iſſue remainder over, where the words "for want of ſuch iſſue" will take in all the contingencies that can ariſe upon the precedent limitations, *viz.* the want of ſons or daughters and the iſſue of ſons or daughters; and what weighs more with me is, that it is a rule, firſt, that where it can be conſtrued a contingent remainder, it ſhall never be conſtrued an executory deviſe: and the reaſon is, becauſe it would put the inheritance into abeyance, which the law diſlikes *(a)*. Secondly, That a remainder ſhall never be conſtrued a contingent one, if it can be conſtrued a veſted one: and the reaſon is, becauſe a contingent remainder may be deſtroyed by the fine or feoffment of the tenant for life; and to conſtrue this a contingent remainder would be putting the whole eſtate into the power of *Marthana*; and for what? Why to put an heir at law out of the power of an anceſtor, and to defeat the expreſs deviſe. And therefore I think the children of *Marthana* would have taken only an eſtate-tail, and that the remainder was veſted in *William*, and was well deviſed.

(a) Quære the reaſon of this rule, for the inheritance is not in abeyance upon an executory deviſe, and is in abeyance upon a contingent remainder. Caſes cited, Cro. Jac. 415. Webb *v.* Herring, 3. Bulſt. 1, 2. 1. Roll. Abr. 830. 2. Leo. 191. 3. Lev. 70. Parker *v.* Thacker. Morris *v.* Wootton, at the Cockpit, 1730. Goodright *v.* Pullen. Wyld *v.* Lewis, 26th April 1738, "I give to my wife; "and if ſhe has no ſon nor daughter be- "gotten by me, and for want of ſuch "iſſue, the eſtate ſhall return to *John* "*Wyld* and his heirs;" "ſon and "daughter" were held to be words of limitation, and the wife tenant in tail. Skinner, 140. 3. Lev. 427. Wynne *v.* Jekyl, Peer. Wms. 1. Salk. 224. Loddington *v.* Kime.—Note *to the original manuſcript.*

Lloyd

Lloyd *againſt* Thurſby. Caſe 155.

In what caſe real and perſonal aſſets ſhall be liable to mortgagee.

FATHER AND SON join in a mortgage of the father's eſtate. The father receives the money, and the ſon conveys in conſideration of ten ſhillings. There was no covenant in the mortgage for payment of the money.

The bill was brought to make both the real and perſonal aſſets of the father and ſon liable to the mortgage-money, the eſtate mortgaged being ſubject to prior incumbrances.

HARDWICKE, *Lord Chancellor*. It has been determined, that the perſonal aſſets are liable, though there be no covenant in the deed for payment of the mortgage-money, becauſe there is a debt contracted by the borrowing. But this demand goes a ſtep further, ſeeking to charge the real aſſets of the father in the hands of the ſon which are not liable in the hands of the heir, even by a bond or covenant of his anceſtor, unleſs the heir be ſpecially named. And as to the ſon, his aſſets are no way liable, for he conveyed only in conſideration of ten ſhillings, had no part of the money, and conſequently no debtor; and neither his real nor perſonal aſſets are bound.

Gwyn *againſt* Hook. Caſe 156.

In Chancery, 17 *July* 1744.

THE TESTATOR *Griffith Daws* having two brothers, *Francis* and *Thomas*, by will deviſed his eſtate to his grand-daughter and heir at law *Elizabeth Lady Bulkeley* in the following words: "I give and bequeath all my lands and tenements to my grand-"child, the *Lady Bulkeley*, during her natural life; and after her "deceaſe, to the right heirs male of me the ſaid *Griffith Daws* for "ever;" and died. S. C. 1. Will. 30.

Lady Bulkeley, upon her marriage with the defendant *Hook*, ſettled the premiſes upon herſelf and her huſband for their lives, and the life of the ſurvivor; and after the deceaſe of the ſurvivor, to the uſe of the defendant, his heirs and aſſigns, for ever.

Lady Bulkeley died; and upon her death the plaintiffs, who were the grandchildren of *Francis* the teſtator's next brother, brought their bill againſt the defendant to be let into poſſeſſion of theſe eſtates under the will of *Griffith Daws*, to whom they were alſo, by *Lady Bulkeley* dying without iſſue, become heirs at law.

The point of law having already come in queſtion upon a demurrer on this very will, in the caſe of *Daws v. Ferrers* (*a*) (*Lady Bulkeley* having formerly been married to *Ferrers*), THE LORD CHANCELLOR, upon the hearing of the cauſe, made

(*a*) 2. Will. 1.

a caſe

Gwyn *againſt* Hook.

a caſe for the opinion of the Judges of the Court of King's Bench, Whether the plaintiffs were intitled to the eſtates in queſtion by virtue of the will of *Griffith Daws*?

The Judges now certified their opinion in the following words: "UPON hearing Counſel on both ſides *(a)*, and conſideration of "this caſe, WE ARE OF OPINION, that the plaintiffs are not "intitled to the eſtate in queſtion by virtue of the will of the ſaid "*Griffith Daws* dated the fourteenth of *November* 1693; for we "conceive, that *Francis*, the brother of the teſtator, under whom "the plaintiffs claim, could not take by the deſcription of "*right* "*heir male of the teſtator.*"

HARDWICKE, *Lord Chancellor*, now declared himſelf ſatisfied with the opinion, and diſmiſſed the bill *(a)*.

(*a*) See the arguments of the Counſel in this caſe 1. Wilſ. 30.

(*b*) It was ſaid by the Counſel, and agreed to by THE LORD CHANCELLOR, that this differed from Brown *v.* Barkham, Precedents in Chan. 442. 461. 2. Vern. 729. the limitation being there to the "heirs male of the body;" and this was ſaid to be the ſame as Sterling *v.* Ettrick, Precedents in Chan. 54.

Caſe 157. Parſons *againſt* Parſons.

The caſe upon the will of *Mr. Alderman Parſons* touching the diſtribution of his eſtate as a freeman of *London*.

UPON THE MARRIAGE of the late *Mr. Alderman Parſons* with the plaintiff his wife, then *Sarah Crowley*, articles were entered into, dated the fourteenth of *April* 1715, between *Mr. Parſons* of the firſt part, *Sir Robert Nightingale* and *Mr. Crowley* of the ſecond part, and the plaintiff of the third part; whereby (reciting the intended marriage between the plaintiff and *Mr. Parſons*, and that *Mr. Parſons* by his bond bearing even date therewith ſtood bound to *Mr. Crowley* and *Sir Robert Nightingale* in the penal ſum of twenty thouſand pounds, ſubject to a condition for the payment of eleven thouſand pounds within ſix months after the intended marriage, and of eleven thouſand pounds which *Mr. Parſons* would have with *Mrs. Crowley* as her marriage-portion) it was covenanted, that the ſaid bond, and the ſaid eleven thouſand pounds thereby ſecured, and the growing intereſt thereof, ſhould be for the uſe and benefit of *Mr. Parſons* and his children by *Mrs. Crowley*, in the manner hereinafter mentioned, *viz.* that if *Mr. Parſons* ſhould pay the eleven thouſand pounds according to the condition of the ſaid bond, then it ſhould be lawful for the truſtees (by and with the conſent of the ſaid *Mr. Parſons* and *Mrs. Crowley*, and the ſurvivor of them) to lay out the ſaid eleven thouſand pounds (according to the condition of the ſaid bond), or any part thereof, in the purchaſe of lands, or place it out at intereſt in the funds, or other public or private ſecurities, "upon truſt, that "*Mr. Parſons* ſhould have and take the rents, intereſt, and profits "thereof for his life; and after his deceaſe, that all the principal "money, or the lands or other ſecurities purchaſed therewith, "ſhould be paid and conveyed to the uſe and for the portions of all "the

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" the daughter or daughters, younger ſon and ſons, at ſuch time " and times, and in ſuch ſhares and proportions, and ſubject to ſuch " proviſoes and conditions, and in ſuch manner and form, as the " ſaid *Mr. Parſons* and *Mrs. Crowley* ſhould, at any time during " their joint lives, or of the ſurvivor of them, by any writing under " his or their hands and ſeals, to be ſubſcribed in the preſence of " three or more credible witneſſes, direct, limit, and appoint; and " in default of ſuch direction, then equally among all the daughters " and younger ſons if more than one, but if only one then to that " one; and in default of child or children, then to *Mr. Parſons*, " his heirs and executors, with a power to truſtees either to con- " tinue the ſaid eleven thouſand pounds upon *Mr. Parſons*'s bond, " or to call it in and lay it out upon the purchaſe of lands or other " ſecurities." Then comes A PROVISO, " that if *Mr. Parſons* " ſhould in his life-time give unto ſuch daughter or daughters, or " younger ſon or ſons, any portion or portions, or ſhould leave " ſuch child or children any ſum or ſums of money, lands or tene- " ments, goods or chattels, at the time of his deceaſe, then the ſaid " portion or portions, or money ſo given by him or left, and the " value of the lands, tenements, goods, and chattels, ſo to be to him " to them or any of them left as aforeſaid, ſhould be taken and " accounted as part of the portion or portions thereby to them " provided, unleſs he ſhould declare the contrary thereof by any " writing, or by his laſt will and teſtament." The marriage took effect, but the eleven thouſand pounds was never paid, but continued on *Mr. Parſons*'s bond; and he by will in 1725, having one ſon and one daughter only (*Sarah*), directed his wife " to pay " his daughter *Sarah* the ſum of eleven thouſand pounds, at ſuch " time and in ſuch manner as he by his marriage-ſettlement was " obliged to pay the ſame;" and made his ſon *John* reſiduary legatee, and his wife ſole executrix. In 1740 *Mr. Parſons*, having then two daughters, *Sarah* and *Anne*, by codicil, reciting his will, and that he had ſince the making of it another daughter born, thereby directs his wife to pay, for the uſe of both his daughters, *Sarah* and *Anne*, the ſaid eleven thouſand pounds, in ſuch manner as by his marriage-ſettlement he was obliged to pay the ſame; and thereby gave to his ſaid two daughters nine thouſand pounds, to be equally divided between them, to be paid at their reſpective ages of twenty-one or days of marriage, which ſhould firſt happen, in caſe his ſaid daughters ſhould marry with the conſent of his wife, and to be firſt had in writing under her hand; but in caſe either of his daughters ſhould marry without her conſent, that the ſhare of the nine thouſand pounds ſo belonging to either of his ſaid daughters ſo marrying ſhould merge and ſink into his perſonal eſtate for the uſe and benefit of his ſon *John Parſons*; and in caſe both his ſaid daughters ſhould marry without ſuch conſent, that then the whole nine thouſand pounds ſhould merge and ſink into his perſonal eſtate for his ſon's benefit. *Mr. Parſons*, being a freeman of *London*, died ſoon after, leaving his ſon *John* and two daughters. *Sarah*, the eldeſt, married the defendant *Dunne* without her mother's

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conſent: whereupon *Mrs. Parſons*, by deed, made an appointment of the eleven thouſand pounds under the articles, and appointed five hundred pounds thereof to her daughter *Sarah*, and the remaining ten thouſand five hundred pounds to her daughter *Anne*.

And now *Mrs. Parſons*, the widow, brought her bill for an account of and touching the diſtribution of her huſband's eſtate; and amongſt ſeveral other points ariſing upon the articles, will, and codicil, the following, which were the only material ones, were determined.

HARDWICKE, *Lord Chancellor*. The firſt point relates to *Mrs. Dunne*'s portion given by the codicil. And this ſeems very clear, the portions being given only in caſe the daughters marry with their mother's conſent; and if they marry without conſent, the portions are directed to ſink into the reſidue for his ſon's benefit; which direction for ſinking into the reſidue was, in the caſe of *Hervey v. Aſton* (*a*), held by THE TWO CHIEF JUSTICES, MR. JUSTICE COMYNS, and MYSELF, to be equal to, and the ſame as, a deviſe to a particular perſon. As to the eleven thouſand pounds, there is no doubt of *Mrs. Parſons*'s power of appointing it; but I think, the whole intereſt thereof muſt be allowed for the maintenance of the two daughters equally unto the time when the plaintiff made the appointment.

THE NEXT QUESTION is, How the diſtribution ſhall be made under the cuſtom of *London*? The plaintiff, *Mrs. Parſons*, being barred by her marriage-articles from any claim under the cuſtom of *London*, the diviſion muſt be in moieties; one to the children, the other to the freeman's part, as it has been often determined; and this ſo long ſince as in *Hall v. Lumley* in 1641 (*b*), *Hancock v. Hancock* (*c*), *Clare v. Aſhmoſly and Rawlinſon* (*d*). But the queſtion of the greateſt conſequence is, Whether, in caſe any of the daughters ſhall elect to take by the cuſtom, ſuch daughter ſhall be obliged to bring into hotchpot what ſhe ſhall take of the eleven thouſand pounds? For though the general rule be, that whatever is received by the child of a freeman in his life-time by way of advancement muſt be brought into hotchpot, yet there may be an exception; and it is not every ſum a child takes from his father that ſhall be brought into hotchpot. The proviſion of the eleven thouſand pounds ariſes from the articles, where the truſt is declared, that it ſhould be lawful for the truſtees to lay out the eleven thouſand pounds, ſubject to ſuch proviſoes and conditions as the ſurvivor of *Mr. Parſons* and his wife ſhould appoint, with a power to the truſtees either to call in or continue the bond. Now nothing is more certain, than that what is to be divided or diſtributed muſt be taken as things ſtand at the freeman's death: not but that the

(*a*) Comy. Rep. 726. 2. Eq. Abr. 147. 216. 432. 503. Caſes T. T. 212. 1. Atk. 361.
(*b*) Tothill, 112.
(*c*) 2. Vern. 665.
(*d*) Cited 1. Wilſ. 644.

eſtate

eſtate may be increaſed or diminiſhed; but the rights are then to be fixed; and this proviſion of eleven thouſand pounds under the articles was merely contingent at *Mr. Parſons*'s death. It might have been appointed at any time during the plaintiff's life, or by her will, and till ſhe had executed her power was a mere contingency; ſo that if there was no more in the caſe it would be exactly that of *Newland v. Shepherd* (*a*), heard firſt by LORD MACCLESFIELD, and then by LORD KING, where the queſtion was, Whether the daughter was fully advanced? turning only upon a proviſion of one thouſand pounds ſhe was intitled to being liable to a contingency at her father's death. LORD MACCLESFIELD was of opinion it was no advancement, but that ſhe ſhould receive her full third of her father's eſtate without any bringing into hotchpot, there being no bringing into hotchpot where there was but one child, and no colluſion between the child and widow; which was affirmed by LORD KING. The preſent caſe, indeed, was endeavoured to be diſtinguiſhed from that, as there the queſtion was between one child only and the widow; but ſtill the ſubſtantial point was, Whether a contingent proviſion, the contingency not happening in the father's life-time, was an advancement? the point being the ſame between an only child and the widow and many children and her. And in order to make this the better underſtood, I will ſtate that caſe of *Newland v. Shepherd* (*b*): A freeman of *London* had married his only child to *Mr. Newland*, and by her marriage-articles contracted to give her a portion of ſeven thouſand pounds, payable by inſtallments of one thouſand pounds a time; the laſt of which was to be paid at the end of ten years, if his daughter, or any child of her's, was living at that time; *Shepherd* died before the expiration of the ten years, but the daughter lived to the end of them; and the queſtion between her and the widow was, Whether ſhe was fully advanced? for if ſhe was, ſhe could claim no orphanage part. And the Court referred it to the Maſter to enquire what was the value of the eſtate. It was reported to be eighteen thouſand pounds, which brought it to a very nice queſtion; for if the whole ſeven thouſand pounds was conſidered as an advancement to the daughter, then ſhe was fully advanced, having received her full third: and LORD MACCLESFIELD was of opinion that ſhe was not fully advanced, but ſhould be let into one clear third of the reſidue, as there can be no hotchpot between a child and the widow, that being only between the children themſelves; and in ſuch caſe the child comes in for an intire third of what is left: the ground of which opinion was, that this ſum of one thouſand pounds, which was to be paid at the end of ten years, if the daughter or any child of her's ſhould be then living, depending upon a contingency, was not an advancement at the death of the father. And upon this point the cauſe was reheard by LORD KING, who was of the ſame opinion, and affirmed the decree. But another diſtinction was taken between that caſe and our's, that

(*a*) 2. Peer. Wms. 194. (*b*) Eq. Caſes Abr. 251.

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here the eleven thouſand pounds was a debt due in the father's life, which was not ſo of the one thouſand pounds in that of *Newland v. Shepherd.* That it was not due is certain, but that will not alter the children's right, which ſtill remained contingent. There was another caſe determined on the point by LORD KING, which is ſtronger than the preſent, that of *Feaſt v. Feaſt*, 5th *April* 1726 (*a*), where *Sir Felix Feaſt*, a freeman of *London*, upon his marriage, agreed to leave his wife, if ſhe ſurvived him having one or more children, two thouſand pounds, his eldeſt ſon two thouſand pounds, and one thouſand pounds a-piece to his younger children; and if his eldeſt ſon died before twenty-one, the two thouſand pounds to be paid to the next ſon; and in caſe any of the younger children died before that age, the one thouſand pounds to be equally divided amongſt the other younger children. The proviſion made for the wife was by the articles agreed to be in bar of her dower and claim by the cuſtom of *London*, but nothing is ſaid as to the children. *Sir Felix Feaſt* died inteſtate, leaving a widow and an eldeſt ſon, a daughter married and advanced, and two or three younger children. The eldeſt ſon inſiſted, he was intitled to his two thouſand pounds in nature of a debt out of his father's perſonal eſtate, and alſo under the cuſtom to an equal ſhare with his brothers, without bringing anything into hotchpot: and decreed by LORD KING, that the two thouſand pounds which *Lady Feaſt* claimed by the marriage-articles, the two thouſand pounds claimed by the eldeſt ſon, and the one thouſand pounds claimed by the younger children, were a debt on the perſonal eſtate, and ſhould be paid with intereſt from the father's death, and the ſurplus to be divided in moieties, one whereof to go, according to the cuſtom, amongſt all the children, and the other according to the ſtatute of Diſtributions, without any direction for bringing into hotchpot. This was the LORD KING's opinion, who had been recorder of *London*; and I look upon it as an expreſs authority in point, that this contingent proviſion in the preſent caſe ought not to be brought into hotchpot. There were indeed two caſes objected to by the defendant's Counſel: that of *Edwards v. Freeman* (*b*), and *Townſhend v. Townſhend*, heard by LORD TALBOT, 3d *May* 1746 (*c*): the firſt of which being upon the ſtatute of Diſtribution is not ſtrictly *ad idem*; for though it be ſometimes ſaid, that the ſtatute was formed upon the plan of the cuſtom of *London*, yet it was not to be taken ſo throughout, the cuſtom and ſtatute differing materially in many points, and particularly in that now in queſtion, the ſtatute requiring any eſtate which the children have by ſettlement from the inteſtate to be brought into hotchpot. And upon this it was that THE MASTER OF THE ROLLS' opinion turned; he holding, that the word "*eſtate*" includes both real and perſonal; that it was not material whether the advancement was in the father's life or not, it being an eſtate by ſettlement, which muſt be brought into hotchpot. Though this be not in the report of the caſe by

(*a*) Eq. Caſ. Abr. 250. 253.
(*b*) 2. Peer. Wms. 435.
(*c*)

Mr.

Mr. Peere Williams, yet it appears by my notes to have been the principal ground of his opinion. Thus it ſtands upon the ſtatute, but the cuſtom of *London* relates only to advancements in the father's life-time. That of *Townſhend v. Townſhend* was indeed upon the cuſtom, but upon a very different reaſon, and not at all applicable here: A freeman of *London* had covenanted, that if his wife died before him, leaving children by him, that after his death his executors ſhould pay four thouſand pounds amongſt her children as his wife ſhould direct; the wife died in his life-time, leaving one child only; the huſband married again, and had other children: and held by LORD TALBOT, that if this child would claim any further ſhare by the cuſtom, the four thouſand pounds muſt be brought into hotchpot; for the wife being dead, and but one child of the marriage, there was no contingency at the father's death, but the four thouſand pounds veſted immediately in that child by the death of the mother, and in the father's life-time; ſo that neither of the caſes ſhake the authority of *Newland v. Shepherd* and *Feaſt v. Feaſt*. There are reaſons in the preſent which would determine my judgment in this point. In *Edwards v. Freeman* (*a*), it was agreed by all the Court, that the contingency on which the proviſion depends muſt be ſo limited as to ariſe within a reaſonable time to warrant the bringing it into hotchpot; whereas in this caſe it might have waited during the whole life of the mother, who could appoint it by deed in her life-time, or by her will. How then could it be an advancement in the father's life, or at his death, as are the words of the articles, none of the children being then intitled to any certain part? It may be ſaid, that after the mother's death, or when ſhe had made the appointment, the children ſhould refund what they had received out of the orphanage part. But what confuſion would this make in the children's ſhare, who could never know for certain the *quantum* thereof without making the diſtribution of the eſtate to wait until the mother had made the appointment. There is another ſtronger reaſon, which is, that *Mrs. Parſons* may make the appointment ſubject to ſuch proviſoes and conditions as ſhe ſhall think fit; which, though this Court would conſtrue to be ſuch as are reaſonable, yet if upon marriage of one of her daughters *Mrs. Parſons* had appointed a particular ſum, with conditions, that if ſuch daughter left no iſſue it ſhould go to the other children, it muſt have waited, and could not be known whether to be brought into hotchpot till it was known whether ſhe did or did not leave iſſue. Beſides all this, there is another conſideration that has great weight with me, which is, that I do not look upon the ſum of eleven thouſand pounds as part of *Mr. Parſons*'s perſonal eſtate at the time of his death, but as *Mrs. Parſons*'s marriage-portion lent to her huſband; and if ſo, this will go to the reſt of all the arguments that have been urged for bringing it into hotchpot. The Court, upon judging upon marriage-articles, conſiders the intent of the parties more than the words: The portion was eleven

(*a*) 2. Peer. Wms. 435. 1. Eq. Abr. 249.

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thouſand pounds; *Mr. Parſons*, in conſideration thereof, gave bond to pay to the truſtees, to whom a power is reſerved of continuing the money upon that bond if they thought proper, the main intent being to ſecure this ſum for the younger children's portions. Had the truſtees not left this money in *Mr. Parſons*'s hands, he could not have made uſe of it in his trade; and therefore this method was taken of lending it to *Mr. Parſons*, ſtill reſerving a power to them to call it in when they thought fit: and what makes me not to conſider it as part of *Mr. Parſons*'s eſtate is, that had the truſtees called it in, and placed it out at intereſt, and paid *Mr. Parſons* the intereſt during his life, it would never have been called part of his perſonal eſtate, and conſequently not liable to be brought into hotchpot. Upon the whole of the matter, I am not at all doubtful in this point, elſe I ſhould have ſent it to be certified by the recorder; but being clear, I will not put the parties to the expence and delay with which that method would be attended.

THE NEXT QUESTION ariſes upon the proviſo in the articles, that if *Mr. Parſons* ſhould give or leave ſuch younger children any portion or ſum, that ſuch portion or ſum ſo given or left ſhould be accounted part of the portion thereby provided, Whether the orphanage ſhare of ſuch daughter as ſhall elect to take by the cuſtom is to go in ſatisfaction of the eleven thouſand pounds or any part thereof? And I think it ſhall not: The word "*leave*" may, indeed, include a proviſion to come by act of law, but in the preſent caſe it is confined to leaving by a voluntary act; and the ſubſequent words, unleſs he ſhould declare the contrary by any writing, plainly ſhew the parties meant ſuch a leaving as the father might direct to go in part of ſatisfaction. The antecedent right which the children have to their orphanage ſhare under the cuſtom againſt any diſpoſition of the father diſtinguiſhes this caſe from that of *Blandy v. Widmore* (*a*), where the huſband left to deſcend or be diſtributed what he might have diſpoſed of otherwiſe, which was therefore conſtrued a ſatisfaction. But there is ſtill a material reaſon againſt this being a ſatisfaction, which is, that the children's orphanage ſhare is liable to other contingencies than their ſhare of the eleven thouſand pounds: the orphanage ſhare of ſuch as die under twenty-one goes over to the ſurvivors; but in the preſent caſe, *Mr. Parſons* may limit eleven thouſand pounds upon quite different contingencies. And in the caſe of *Savile v. Savile* (*b*) it was held, that an eſtate which goes in ſatisfaction of another ought, from the nature of the thing, to have the ſame qualities with that which it is intended to come in the place of; and it ſignifies nothing to ſay, that the contingencies have not happened, for it is enough that they might have happened.

(*a*) 2. Vern. 709. (*b*) 1. Chan. Rep. 79.

Ex

Ex parte Wincheſter. Caſe 158.

In what caſe a huſband ſhall be allowed to prove the money ſettled on his wife under a commiſſion of bankruptcy againſt her father.

JOHN GRANT, previous to the marriage between the petitioner and his daughter, by bond, dated the ſecond of *July* 1739, became bound to the petitioner by the penal ſum of two thouſand pounds, conditioned as follows: "That if the marriage take effect, "and if the heirs, executors, or adminiſtrators, of *John Grant* "ſhould, at the expiration of twelve months after the death of the "ſurvivor of the ſaid *John Grant* and *Barbara* his wife; pay or "cauſe to be paid unto the petitioner, his executors, adminiſtrators, "or aſſigns, the ſum of one thouſand pounds; AND ALSO, if the "ſaid *John Grant*, his heirs, &c. ſhould, until the one thouſand "pounds became due and be paid, well and truly pay unto the "petitioner, his executors, adminiſtrators, or aſſigns, intereſt for "the ſame after the rate of four *per cent.* by equal half-yearly pay-"ments on *Chriſtmas-Day* and *Midſummer-Day* in every year, the "firſt payment to be made at the *Chriſtmas-Day* then next enſuing, "that then, &c." By articles bearing even date with the bond this money was to be laid out at intereſt, and the intereſt to be paid to the huſband for life, then to the wife, and then the principal to be divided amongſt his children as therein mentioned. *John Grant* the father paid all the intereſt up to *Chriſtmas-Day* laſt, but none of the payments were made preciſely upon the day they became due, but ſome days after. Before *Midſummer*, no intereſt being due on the bond, the father became a bankrupt.

And now the petitioner *Wincheſter* prayed to be admitted a creditor under the commiſſion for the one thouſand pounds ſo ſecured.

IT WAS ARGUED *for the aſſignees*, that no action could be brought upon this bond at the time of the bankruptcy, and therefore it was no debt; and that the intereſt accrued due on *Midſummer*, ſince the bankruptcy, could not intitle the petitioner to be let in. And to ſhew that no action could be brought upon this bond it was argued, that though an action lay at common law upon non-payment of the money at the day in the condition, even though it was paid at a day after, yet that now by 4. & 5. *Anne*, c. 16. ſ. 12. money paid after the day might be pleaded in bar as well as at the day, provided it was paid before the action brought: ſo that this caſe is within the act; and conſequently as no action could be brought, no debt was due.

HARDWICKE, *Lord Chancellor*. It is to be wiſhed ſome rule was ſettled by act of parliament for theſe kind of caſes as well as for thoſe that fall within the 7. *Geo.* 2.; for as the law now ſtands, they turn upon nice legal diſtinctions no way relative to the real merits of the cauſe. I ſhall take this caſe and the foregoing one of *Groom* together, and muſt give different judgments on them. Upon ſuch diſtinctions variety of cauſes of this ſort have come before the Court; ſome wherein there has been a covenant with

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truſtees by the huſband to pay money immediately to be placed out at intereſt upon future and contingent truſts; others where a future and contingent payment is to be made, and a judgment given in a penal ſum to ſecure it. In the firſt of theſe caſes, if the huſband becomes a bankrupt after the time the money is by the covenant payable to the truſtees, and before it is due on the future truſts, the truſtees are to be admitted as creditors; and the Court will do equity upon the covenant. So in the ſecond inſtance, of a judgment at law, they are admitted creditors (though there be a contingent defeaſance); becauſe in both theſe caſes the covenant might in the one be ſued at law as broken, and execution on the judgment be taken out immediately on the other. But where the ſecurity is by bond, the queſtion has always turned upon this, Whether the bond was forfeited at law? for if ſo, the aſſignees can only be relieved upon the equitable terms againſt the penalty. Now in this of *Wincheſter*'s it is admitted, there was a breach before the bankruptcy by non-payment of the intereſt at the days in the condition; and the queſtion is, If this be ſuch a breach as will ſupport an action? which depends on the ſtatute for Amendment of the Law. Before the act, it was clearly a breach of the condition, notwithſtanding the ſubſequent acceptance; but a new plea is given by that ſtatute, *viz.* payment before the action brought. The bonds deſcribed by the act are bonds payable at a certain day and place; this is a bond payable, as to the intereſt at ſeveral days, and as to the principal ſum at a day future and uncertain. It is not therefore within the words of the act, nor is it within the intent; for it is unreaſonable to allow ſuch a plea to theſe bonds, where the penalty to be recovered is a ſecurity; for though nothing is due, yet it is fit the obligee ſhould be at liberty to get judgment on the penalty for his ſecurity; and if he does, courts at law will exerciſe an equitable juriſdiction by not ſuffering execution to be taken out without juſt cauſe; and this they did before the ſtatute; they will ſtay execution on payment of what is due; and the judgment to ſtand as a ſecurity. If therefore this be not within the ſtatute, the penalty might have been recovered at law before the bankruptcy; and if ſo, this Court will relieve the aſſignees only upon equity being done according to the condition.

As to the petition *Ex parte Greome (a)*, I think the caſe not within the ſtatutes of bankruptcy, nor can the petitioner be admitted a creditor, for no action could have been brought, nor was any debt due before the bankruptcy. Then the queſtion is, Whether the petitioner can be let in, the contingency happening during the bankruptcy, and before the ſecond dividend? In the caſe cited of *Cazalet*, the contingency had not happened, and the petitioner was refuſed; but it was there ſaid, by LORD KING, that if the contingency happened before the ſecond dividend made, the creditor ſhould be admitted. Now that was an *obiter* ſaying of his own upon a point not in judgment before him. It was doubted by LORD

(a) 1. Atk. 115.

TALBOT;

TALBOT; and upon conſideration I AM OF OPINION, the petitioner cannot be let in. The point depends on the act about Certificates, 5. *Geo.* 1. it being a general rule, that the creditor's privilege to come in under the commiſſion, and the bankrupt's privilege to be diſcharged of the debt by certificate, are co-extenſive; and it is extremely juſt they ſhould be ſo. Now by the 5. *Geo.* 1. the bankrupt cannot be diſcharged by certificate from this debt, becauſe the act ſays, "debts due and owing at the time "of the bankruptcy;" and other clauſes of the ſtatute ſhew its general intent and proviſion to relate to debts owing then only, as that relating to mutual creditors only, &c. And within that clauſe, this could not be ſet off againſt a preſent debt due to the bankrupt; and indeed the penning of all the clauſes ſhews the ſtatute extends only to debts due before the bankruptcy. Now this was not ſo, and conſequently not diſcharged by the certificate. And the 7. *Geo.* 1. has a particular clauſe, where future debts are let in for diſcharge of bankrupts in thoſe particular caſes. The caſe of *Tully v. Sparks* is a clear authority in point againſt the petition. And the general rule is as I have already mentioned, which I rely upon; if that rule was not to prevail, it would be a great hardſhip both on the bankrupt and the other creditors, for ſuch a creditor as this would have a double remedy; he might come in as creditor for part, and might bring an action too after the certificate for the reſidue: and the certificate could not be pleaded againſt him as a diſcharge, as it might againſt creditors whoſe debts became due before the commiſſion. Therefore this petition muſt be diſmiſſed.

Ex parte WINCHESTER.

But in that of *Wincheſter*, I order the petitioner to be admitted a creditor for principal and intereſt on the dividend he ſhall receive, to be laid out according to the articles.

Bailey *againſt* Wilſon. Caſe 159.

At the Seals before Hilary Term, in Chancery, 1744, 18. Geo. 2.

ON A PETITION for a commiſſion of review upon ſentence of the court of delegates here, confirming a will made in *Ireland*, which was conteſted for divers reaſons, an objection was made for reading the evidence of *Mr. Magill* in favour of the will, as to which the caſe ſtood thus:

Evidence, in what caſes allowed to be read in chancery in favour of a will.

S. C. 5. Bro. P. C. 388.

The teſtator had given ſeveral ſpecific legacies of a watch, plate, &c. to different perſons, and appointed the defendant *Wilſon* executor. It appeared in proof in the cauſe, that *Wilſon*, immediately after the teſtator's death, ſent for *Magill* and ſeveral others to whom theſe ſpecific legacies were given; that *Magill*, in *Wilſon*'s preſence, took the things ſo bequeathed and gave them to the legatees without *Wilſon*'s hindering it, though *Wilſon* did ſay there was time enough to do it, and that it was too early; but *Magill* declared, that the teſtator had deviſed it, and that he ſhould ſee them diſtributed.

The

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The objection to *Magill*'s evidence was, that by this act he had made himſelf executor *de ſon tort*, and was therefore intereſted in the event of the cauſe; becauſe if this was not a good will, the perſons to whom adminiſtration ſhould be granted would have an action againſt him as a treſpaſſer, and in trover would recover damages againſt him.

To which IT WAS ANSWERED *for the defendant*, that *Magill* was intereſted on both ſides, for he was liable to have an action brought againſt him by *Wilſon* the executor; and though a man ſhould be finally intereſted in the event of a cauſe, if he be not principally intereſted, his being conſequently ſo will not go to his competency, though it may to his credit. Thus, if an eſtate be left to *A.* for life, and after to the pariſhioners of *B.* the pariſhioners ſhall be competent witneſſes, becauſe every man who ſo gives evidence may die before this remainder comes into poſſeſſion. So the heir at law may give evidence for his anceſtor, becauſe his anceſtor may diſpoſe of his eſtate otherwiſe than to him; and cited *Eaſt India Company v. Goſlin*, in the king's bench, about two or three years ago; where, at the trial, the ſailors who had forſaken the ſhip, as well as the captain, were refuſed, upon a preſumption that if they had not done their duty they were chargeable; but upon motion for a new trial it was granted, becauſe they not being principally but only conſequently and without certainty intereſted in the cauſe, were not incompetent witneſſes, but their credit muſt be left to the jury. There was alſo cited *The King v. Bray*, before this Chancellor when Chief Juſtice, which was upon an information relating to the borough of *Tentageu*, where it was held, that the mayor of the corporation was no incompetent witneſs to give evidence of a cuſtom as to what he did when he was mayor.

MR. ATTORNEY-GENERAL replied, FIRST, That the executor of this will could not maintain an action for theſe goods againſt *Magill*. SECONDLY, Suppoſing he could, yet he could not recover ſuch damages againſt him as the adminiſtrator would in caſe this will was made void. As to the firſt, Where there is a lawful executor, he only has a right to bring trover againſt an executor *de ſon tort*, but it is under conſideration of the jury how far the action is maintainable, and what damages ſhall be given; and therefore in caſe of debts paid by an executor *de ſon tort*, he cannot plead that he has paid the debts, but ſhall give it in evidence, and ſhall be recoupled in damages in an aſſiſe brought againſt him by the diſſeiſee. 5. *Co.* 30. *Carth.* 104. *Skin.* 274. And this, not becauſe the payment was originally a good one, but that juſtice may be finally done to both parties; and at the ſame time he is puniſhed for meddling with what did not belong to him; he may not be obliged to pay twice the ſame ſum: but in the preſent caſe no ſuch action can lie, for a man cannot bring an action for an act done by his conſent; the legacies were paid with the executor's privity; and his not hindering it muſt be taken for a conſent. Suppoſe the lawful executor had brought an action againſt the legatees

legatees (for he has right, if the property remains in him to bring an action for the goods wherever they are), could there have been a verdict for the executor? No, certainly; the legacies are given, and ought to be paid; and though the executor's assent be necessary, yet it is not from that assent the legatee derives his right, but from the will: the assent of the executor only completes the right; and therefore the least thing will serve to prove it, where the executor cannot be injured by it (and even where he can, if it be shewn it is sufficient); and here is no want of assets. Now if he cannot recover against the legatees, neither can he against the executor *de son tort*, for he can recover against him only upon the foundation of the property remaining in him, which is the foundation of the action against the legatee. But, secondly, Suppose the action did lie, there is no ground for putting the two interests upon a level; there being such a difference of what one and the other should recover, in the one case the whole would be recovered, in the other but an inconsiderable trifle; and it is this difference of interest that will prevent him from being impartial. Now what would the lawful executor recover against the executor *de son tort?* It was said, that the Court cannot consider what a jury would do, but only what the law gives. But what are damages? Are they not what a jury must enquire into, and contain the prejudice which the plaintiff on demand hath suffered? In an action of trover, nothing is recovered but damages; and the Court must direct the jury that what they think the plaintiff has suffered, is the question: and what damages has he suffered here? None. It is to prevent circuity (which a court of law always does where there is not a necessity, as where the action is not brought for a special thing) that he shall recover next to nothing. Suppose the rightful executor should bring a bill here against the executor *de son tort*, Would the Court oblige him to pay over again what he had once paid? No. An executor *de son tort* shall be allowed all payments which the rightful executor ought to have made (*Chan. Ca.* 33. 126.), and so justice is done on both sides. How then can he be said a disinterested witness, since the reason for rejecting evidence is the bias of mind arising from the interest the witness has in the event? In the case of *The East-India Company v. Goslin*, the sailors were admitted from a necessity of the thing; and besides the duty of the captain and the men were different; it was their duty to obey him; and while they did so, their bonds to him could not be forfeited. So where a goldsmith's servant is admitted to swear to an account, it is for the sake of necessity.

HARDWICKE, *Lord Chancellor*. The question is, Whether the objection to *Mr. Magill*'s evidence goes to his own competency or only to his credit? And I am of opinion it goes only to his credit, and not his competency. In order to determine the question, I shall consider this fact in two lights: FIRST, How the point stands, supposing *Mr. Magill* to have acted as executor of his own wrong: SECONDLY, As acting with the privity of the executor named in the will. As to the first; Before probate

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of the will, he delivers part of the teſtator's goods to perſons named legatees in the will. It is ſaid, that if the will be not valid, he is liable to make ſatisfaction to the adminiſtrator for the converſion of theſe goods. To which it is anſwered, he is liable either way; and the poſſibility of an action againſt him by the executor being weighed againſt the other, ſets off the matter at large. There are many caſes where if a witneſs is liable to account either way, he ſhall be examined; which anſwers the objection in reſpect of his competence: and this objection of a man's being liable to an action differs from his immediately being intereſted. There has been ſome change in the doctrine on theſe points, there being caſes in the old Books where a man's being liable to an action went to his competency: but there is a great difference to be made between having an immediate intereſt and a poſſibility: as in the caſe of tenant in tail, with remainder over, in an action brought againſt the tenant in tail the remainder-man cannot be a witneſs, though an heir at law might, as having nothing veſted in him; but the remainder-man has a veſted intereſt, which the law conſiders as part of the ſame fee; and therefore the ſupporting the tenant in tail's intereſt is the ſupporting his own. Now theſe veſted intereſts are very different from a poſſibility of action; for ſuppoſe an action of treſpaſs brought for a nuſance, and the queſtion is, Whether the defendant worked upon the plaintiff's ſoil? the action may be brought againſt the principal alone, or the workmen may be joined as defendants with him; but if they are not joined, they may be brought as witneſſes; and yet they are liable to have an action of treſpaſs brought againſt them; and their confeſſion may be evidence againſt themſelves; but the Court ſays, that may go to their credit, not to their competency; and the reaſon of allowing them is, that truth may the better come out. There was a caſe mentioned of *The King v. Bray*, before me when Chief Juſtice of the King's Bench, which was upon an information relating to the borough of *Tentageu* upon the nomination of eliſors who are to return the jury. At the trial, the mayor was called to prove the cuſtom; and objected, that he was the mayor that acted, and was now brought to eſtabliſh his own act, in which, if he had done wrong, he was liable to be puniſhed; and BARON THOMPSON, who tried the cauſe, allowed the objection: but upon a motion for a new trial, the court of king's bench was of opinion, that the objection went only to his credit, not to his competency. A new trial was granted. In the argument of that caſe ſeveral others were put, particularly *The King v. Clark*, where, upon an information for a nuſance in the river of *Thames*, a perſon who had received a particular injury and damage by it was produced as an evidence, and objected to, becauſe he might bring his action on the caſe and recover damages, and ſo would ſwear under a bias; but the Court held, this went only to his credit, not to his competency.

This being the general rule as to points of this nature, let us now conſider the anſwer, that *Magill* is liable to an action either way. It is admitted, this would be ſufficient if the damages to be recovered

recovered againſt him were equal; which is not the caſe here, for the lawful executor can recover no damages without deducting what has been rightfully paid according to the will. I never knew, in any caſe where this anſwer was given, the Court enter into the conſideration what might be the *quantum* of the damage. There is always a difference in the damages. Perhaps no action may be brought, or the witneſſes may be favoured by the party he ſupports; ſtill if there be an equality, by an action on each ſide, the Court will not enter into the conſideration of the damages: and it would be going too far now to enter into it in order to determine whether this objection goes to a man's competency who is in the nature of an executor of his own wrong (as to the abatement in damages nothing is ſaid of it in *Read's Caſe*, 5. *Co.* 33. *b.*): he is liable to an action by the creditors, and to an action of trover by the executor as a wrongdoer. Indeed, in *Carth.* 104. it is mentioned by LORD HOLT, that in trover brought by a rightful executor after probate againſt a man acting as executor of his wrong, he cannot plead payment of his debts, but ſhall give it in evidence, that the plaintiff may not recover the whole againſt him. This amounts to no more but that he may give it in evidence in mitigation of damages; and he can plead nothing but not guilty, and cannot ſet himſelf up as executor, becauſe he will be anſwered, that the plaintiff is executor, and has a probate. But nothing is ſaid in that caſe touching this point by the other Judges; and the judgment was given againſt HOLT's opinion. It is laid down ſomewhat differently in *The Office of Executors*, which is a book of good authority: If an executor *de ſon tort* pays debts, this payment is good; and if the payment be out of his own goods, he may retain; yet that muſt be underſtood with this difference, that the payment ſhall ſtand as againſt creditors, but not againſt a rightful executor, for then any ſtranger might uſurp and take from him the liberty which the law gives him of preferring one creditor to another, nay of preferring himſelf to other creditors in equal degree with himſelf; and therefore upon an action brought by a rightful executor againſt an executor *de ſon tort*, if the value of the eſtate appears clearly, and that the debts were good debts, the Court would direct the jury to deduct this in damages; but if there be a doubt about it, the rightful executor ſhould not in this action be put to account for the value of the aſſets: and it would be wrong to ſuffer a man who is a treſpaſſer to enter into it, but leave him to recover as he can. There cannot, therefore, be any certain rule, and it cannot be ſaid what damages ſhall be recovered. Now what appears in the preſent caſe? What was the *quantum* of the aſſets? What were the debts? Whether the legatees ought to have their legacies? How then can it be aſcertained that he is liable to more loſs one way than another? It is therefore a good anſwer to ſay, there is an equality of action, which way ſoever this be determined. There is a great difference between an exception to a witneſs and a challenge to a juror. A juror muſt ſtand indifferent before he is ſworn; and therefore an objection to a juryman need not be ſo

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ſtrong as that to a witneſs, for an exception to his credit goes to his competency, both being blended together; but it is otherwiſe in witneſſes, who though their credit be weak are ſtill admitted, that all the light poſſible may be had. This was the fact in *The Eaſt-India Company v. Goſlin*, the queſtion being, Whether ſailors who had given bonds to the maſter and had deſerted the ſhip could be examined to prove the ſhip was not forſaken without cauſe? and as they had no intereſt in that particular action, the Court thought the objection went to their credit, not to their competency. And of late courts have borne towards allowing ſuch objections only to the credit of witneſſes. SECONDLY, If *Magill* be conſidered as acting with the privity of *Wilſon*, this makes his evidence receivable here without diſpute. Now *Wilſon*'s account amounts to this: That after the teſtator's death he ſent for *Magill*; that there came ſeveral friends, and particularly the legatees, whom *Magill* propoſed delivering their legacies to, ſaying, the teſtator had deſired him to ſee their's delivered; that upon *Wilſon*'s ſaying he thought it too early to deliver out effects, *Magill* replied, "The teſtator deſired it;" and he did accordingly deliver them in *Wilſon*'s preſence, who does not ſay that he objected to it. Is not this ſufficient to make it *Wilſon*'s own act? for an executor may before probate diſpoſe of the eſtate; and if a diſpoſition in conſequence of the will be made by another with the privity of the executor, it is done by his conſent, and that perſon is no more than his agent. Will it therefore be an objection to a witneſs, that an executor has employed him as his agent? And yet in ſuch caſe the man is liable, if the will is ſet aſide; but it never was thought, that becauſe a witneſs to a will was employed in the management of the eſtate, and diſtributor of the effects, that ſhould take away his competency; and the conſideration of actions to be brought againſt him hereafter is too remote. Taking the caſe in this light, which is the right one, the objection will not go to *Magill*'s competency, for any man who has meddled even for a moment will be liable, as a treſpaſſer, to be ſued by the adminiſtrator; but this is too remote a conſideration. I AM THEREFORE OF OPINION, *Mr. Magill*'s evidence ſhould be read.

Caſe 160.

Bland *againſt* Bland.

February 20, 1745.

A deviſe of lands *for ever* conveys an eſtate in fee, and is not affected by ſubſequent words requeſting the deviſee, "in caſe of failure of iſſue "of his ſaid body," to give the eſtate to another.

DAME BLAND deviſed her eſtate to her ſon *Sir J. Bland*, his heirs, executors, adminiſtrators, and aſſigns, for ever, and did thereby earneſtly requeſt her ſaid ſon, that in caſe of failure of iſſue of his ſaid body he would give the eſtate, or ſo much thereof as he would ſtand ſeiſed of at his death, by his will or otherwiſe, to the teſtator's daughter. After her death, *Sir John Bland* made his will, and gave this eſtate to another perſon, contrary to the requeſt.

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BLAND against BLAND.

One of the points inſiſted upon in the cauſe was, that the deviſe in the will of *Lady Bland* was a deviſe in fee, and no way reſtrained by the ſubſequent requeſt to diſpoſe of it in ſuch and ſuch a manner.

HARDWICKE, *Lord Chancellor.* This caſe comes before the Court on two bills brought for ſeveral purpoſes. The end of the original bill is to have the direction of the Court touching the rents and profits of *Sir J. Bland*'s eſtate, and to have his will carried into execution. The croſs-bill is for raiſing two portions of two thouſand pounds and one thouſand pounds. This will is not eaſy to explain. The firſt queſtion ariſes on the manor of *Widdington*, in *Lancaſhire*, which were the real eſtates of *Lady Bland*, and ſubject to her deviſe with a charge of portions. And the queſtion is, Whether he had an abſolute power to deviſe? And at law there is no queſtion of this, for the eſtate is to him and his heirs, and therefore veſted in him in fee. But the point contended for is, What eſtate he had in equity? Whether in fee, in tail, or for life? and the doubt ariſes upon the earneſt requeſt to ſettle the eſtate.

It is urged on the ſide of the defendant, that this requeſt is a direction to ſettle the eſtate as is therein mentioned, and is imperative, the ſame as if ſhe had deviſed in ſuch manner; and therefore in equity he is no more than a truſtee to limit this eſtate to the uſes therein mentioned. And for that purpoſe it is inſiſted, that any deſire in a will is equal to a deviſe, becauſe a will is no more than a declaration of the teſtator what he will have done after his death; and if this be ſufficiently declared, it muſt take place; but a perſon in his will muſt *velle* not only *petere et rogare.* And whether ſuch expreſſions are declarations of the teſtator's abſolute will and pleaſure, or only a requeſt to be granted or refuſed, depends upon the circumſtances of the caſe. There are many caſes where expreſſions of this kind are conſidered as directions. In *Maſon v. Emery* the words were, "I deſire him at his death to give;" in *Maſſey v. Sherman*, "hoping, and not doubting, and being well ſatisfied, "and putting a truſt and confidence in her, that ſhe will diſpoſe." There could be no queſtion but that this was a *direction* how to act; the words "truſt and confidence" ſhewed that nothing was left to her but the choice whether ſhe would give it among all or to ſome only.

The queſtion here therefore is, Whether the words of the teſtatrix are imperative? And it is plain they are not ſo; there is no requeſt to ſettle the whole lands, or any particular part, but a power is left in him to diſpoſe of, ſell, or give away, the whole eſtate in his life, and only ſo much as he ſhould ſtand ſeiſed of at his death ſhe requeſts he ſhould ſettle. That is as much as if ſhe had ſaid, "I leave it to you to diſpoſe of as you think fit, but I ſhould be "glad you would give as much as you can ſpare ſo and ſo."

Sir

BLAND *againſt* BLAND.

Sir John might have ſold this, or ſettled it for the advancement of a ſon or daughter.

It is objected, the circumſtances of the eſtate occaſioned theſe words; the eſtate was ſubject to her and her huſband's debts, therefore he muſt have a power to ſell; and it is as much as if ſhe had ſaid, he ſhould ſettle ſo much as remained unſold after all the debts paid: but no ſuch conſtruction can be made, for what ſhe ſays is, "at the time of his death." And this has no connection with payment of debts and legacies. And this is very near the caſe of *The Attorney-General v. Hall*, 1735, which was heard with the aſſiſtance of SIR JOSEPH JEKYLL and *Lord Chief Baron* REYNOLDS: *Thomas Hall* by will gave all the reſt and reſidue of his perſonal eſtate to his own ſon *Francis* and the heirs of his body; but in caſe his ſon ſhould depart this life leaving no heirs of his body living, then "I give ſo much as he ſhall be poſſeſſed of at the "time of his death to the corporation of *Goldſmiths*," upon truſt for ſeveral charities. Bill was brought by THE ATTORNEY-GENERAL to have this eſtate applied in charities upon the contingencies which had happened. But it was held, that this contingency did not take place; and SIR JOSEPH JEKYLL and THE LORD CHIEF BARON founded their opinion on the words "ſo "much thereof as he ſhall be poſſeſſed of at the time of his death;" otherwiſe the contingency would not have been too remote, becauſe confined to the time of his death; but here was a power or property left in him to diſpoſe; and the teſtator had given nothing over but what he ſhould be poſſeſſed of at the time of his death. This ſhewed he intended his ſon ſhould have the clear property of it, and therefore the deviſe over was void. It is objected, that this is a power given to him to diſpoſe during his life; and though he held this eſtate for life or in tail only, there might be ſuch a power given him for a particular purpoſe. But this would not anſwer the will, for ſhe has given him a fee-ſimple, and no power is given but what flows from his eſtate. She takes it for granted, from his having the fee, that he could ſell and diſpoſe of it as he pleaſed, and therefore ſhe requeſts; and by the whole penning this requeſt is ſubject to his direction. I do not lay it down, that in a will a requeſt may not amount to a legacy, but it ſhould be limited to ſome certain thing, or for ſome certain part of a thing, and not left abſolutely to the pleaſure of the perſon to whom the requeſt is made.

Caſe 161.

Ellinor *againſt* Garton and Others.

The court of chancery will not order a deviſee of land to make ſatisfaction to the heir for monies laid out by the teſtator, on a notion that he was poſſeſſed of an eſtate in fee.

JOHN ELLINOR, on his marriage, ſettled the lands in queſtion on himſelf and his wife for their lives; remainder to the heirs of their two bodies; remainder to the right heirs of *John Ellinor*. In this deed, *Ellinor* covenanted with the truſtees in the uſual manner that he had a good title, and that the eſtate was free from incumbrances. There was no iſſue of the marriage; the wife died;

John

John Ellinor deviſed the premiſes to one of the defendants, and died. His heir at law, the plaintiff, deriving his title under the marriage-ſettlement, entered. Then it appeared, that *John Ellinor*'s father made a will, and deviſed the premiſes to his ſon *John* in tail remainder; ſo that upon his death without iſſue the remainder took effect in *A. B.* a defendant, who brought his ejectment, and obtained a verdict at *York* aſſizes.

The bill was filed, FIRST, To diſpute the verdict at law. SECONDLY, To demand a ſatisfaction out of the perſonal aſſets of *John Ellinor*, on the foundation of the covenant in the marriage-ſettlement that *Ellinor* had a good title, &c. THIRDLY, That a ſatisfaction might alſo be made by the defendant, who claimed under the will, for the money which *Ellinor* had laid out in building upon the premiſes under the notion of his leaving an eſtate in fee.

THE ATTORNEY-GENERAL and MR. NOEL gave up the firſt and third points, and inſiſted only on the ſatisfaction out of the perſonal aſſets on account of the breach of the covenants; and ſaid, this caſe was like thoſe of *Kettleby v. Atwood* (*a*) and *Lechmere v. Lechmere* (*b*).

HARDWICKE, *Lord Chancellor*. The firſt and ſecond points are very properly relinquiſhed. If there was anything wrong in law or in fact at the trial, the party might have had his remedy by a bill of exceptions, or by moving for a new trial. So as to the other point: If tenant in tail would be weak enough to lay out money on the lands intailed, there can be no pretence that any allowance ſhould be made for this.

SECONDLY, In this conſideration of the caſe, it is widely different from thoſe to which it is compared; for in the caſe of *Lechmere v. Lechmere*, &c. there is an expreſs covenant to ſettle lands; and there is no doubt that where a perſon, for a valuable conſideration, covenants to make a ſettlement upon the iſſue of the marriage, and to limit a remainder to his own right heirs, if all the iſſue of the marriage die, the Court will decree a ſatisfaction to the heir at law, notwithſtanding he is a volunteer; for what is regarded in equity in caſes of this nature, is the intention of the perſon making the covenant; which appears to be, that ſo much of his perſonal eſtate ſhould be applied in the purchaſe of lands for the uſes in the covenant: ſo that the queſtion being between the heir at law, who claims under the covenant, and the perſonal repreſentatives, the Court is certainly right in decreeing, that they both ſhall have juſt as much as was intended for them; the one not taking ſo large a ſhare of the perſonal eſtate as he muſt take if the covenant was not performed; the other having no greater benefit by a ſatisfaction out of the perſonal eſtate than the covenantor intended he ſhould have, if a proportionate part of it had been applied towards the purchaſe of lands. And ſo far is the intention of the party regarded in theſe caſes, that if it appear that a covenantor meant to prefer his perſonal

(*a*) 1. Eq. Abr. 273. 2. Chan. Rep. 404. 1 Vernon, 298. 471.

(*b*) 2. Eq. Abr. 31. 501. Caſes T. T. 83. 3. Peer. Wms. 211.

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repreſentative to his heir at law, the latter ſhall have no ſatisfaction out of the perſonal aſſets; nay, the Court goes ſo far as to admit parol evidence to ſhew the intention.

But this cauſe comes before the Court in a ſtrange perplexed manner; the deviſee and the heir at law are both parties to the ſuit. Now if a man who has no title ſhould deviſe his eſtate, Is the deviſee intitled? Surely not. Is then the heir at law capable of having ſatisfaction made to him in this caſe, contrary to the teſtator's intent? Shall ſatisfaction be decreed to him, and he be made a truſtee for the deviſee? This would be the wildeſt notion in the world.

Let the bill, therefore, be diſmiſſed without coſts. But if the plaintiff gives the defendants any further trouble concerning the premiſes, the defendants have leave to apply to the Court for coſts.

Caſe 162.

Pagget *againſt* Gee.

Lincoln's-Inn-Hall, December 4, 1753.

If *tenant in tail* make a leaſe, and dies without iſſue before the rent becomes due, the rent in arrear at the time of his death ſhall, by virtue of the 11. *Geo.* 2. c. 19. be apportioned between the perſonal repreſentative of the tenant in tail and the remainder-man in fee.

A TENANT IN TAIL, with remainder to defendant in fee, leaſed for years, and died without iſſue a week before the payment of the half-year's rent. The leſſee at the day paid all the half-year's rent to the defendant. The executor of the tenant in tail brought his bill for apportionment of the rent.

HARDWICKE, *Lord Chancellor*. This point has never been determined, but this is ſo ſtrong a caſe that I ſhall make it a precedent. There are in it two grounds for relief in equity: The firſt ariſes on the ſtatute 11. *Geo.* 2. c. 19. ſ. 15.; the ſecond on the tenant's having ſubmitted to pay the rent to the defendant.

FIRST, The relief ariſing upon the ſtatute is either from the ſtrict legal conſtruction, or in equity founded upon the reaſon of it.

S. C. Amb. 198. 1. Peer. Wms. 392. 3. Peer. Wms. 234. 2. Bl. Rep. 1016.

To conſider what the miſchief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinable eſtate, died but a day before the rent reſerved on a leaſe of his became due, the rent was loſt, for no one was intitled to recover it: his repreſentative could not, becauſe he could only bring an action for the uſe and occupation, and that would not lie where there was a leaſe, but debt or covenant; nor could the remainder-man, becauſe it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy; but there are two deſcriptions of perſons to whoſe executors the remedies are given. In the preamble, it is one having only an eſtate for life; in the enacting part, it is tenant for life. Now tenant in tail comes expreſsly within the miſchief. And I do not know how judges at common law would conſtrue this act, but I ſhould be inclined in this court to extend it to them; I ſhould make

make no doubt, were this the caſe of a tenant in tail after poſſibility of iſſue extinct, for he is conſidered in many reſpects as tenant for life only; he cannot ſuffer a recovery, he may be enjoined from committing waſte ſuch as hurts the inheritance, as ſelling timber, though not from committing common waſte, being conſidered as to that as tenant in tail. Was it the caſe of tenant for years determinable upon lives, he muſt certainly be excluded within the act, though it ſays only tenant for life. It would be playing with the words to ſay otherwiſe. Theſe caſes ſhew the neceſſity of conſtruing this act beyond the words of it. Tenant in tail has certainly a larger eſtate than a mere tenant for life, for he has the inheritance in him, and may, when he pleaſes, turn it into a fee; but if he do not, at the inſtant of his death he has but an intereſt for his life. Such too is the caſe of a wife tenant in tail *ex proviſione mariti*. I give no abſolute opinion upon the point.

PAGET *againſt* GEE.

As to the equity ariſing from this ſtatute, I know no better rule than this, *Equitas ſequitur legem*. Where equity finds a rule of law agreeable to conſcience, it purſues the ſenſe of it to analogous caſes. If it does ſo as to maxims of the common law, why not as to the reaſon of acts of parliament? Nay, it has actually done ſo on the ſtatute of Forcible Entries, upon which this Court grounds bills, not only to remove the force, but to quiet the poſſeſſion. That act requires a legal eſtate in the poſſeſſor; this Court extends the reaſon to equitable intereſts.

But I ground my opinion in this caſe on the tenant's having ſubmitted to pay the rent; he has held himſelf bound in conſcience to pay it for the uſe and occupation of the land; the laſt half-year he paid it to the defendant, which he was not bound to do in law; and in ſuch a caſe, the perſon he pays it to ſhall be accountable, and conſidered as receiving it for thoſe who are in equity intitled to it. The diviſion muſt be that preſcribed by the ſtatute; and then the plaintiff is entitled to ſuch a proportion of the rent as accrued during the teſtator's life.

AND THEREFORE I DECREE the defendant to pay him ſuch ſhare; and if they diſagree, let it be referred to the Maſter to ſettle it, and each party to pay his own coſts till this time, reſerving the conſideration of what may be afterwards incurred.

Pullen *againſt* Lord Middleton.

Caſe 163.

Lincoln's-Inn-Hall, March 15.

Copyhold.

THE CASE, as to the principal point, was to this effect: An eſtate was limited to truſtees to the uſe of *A.* and the heirs of her body. She married *B.* Theſe lands were copyhold, and held of the manor of *C.* and by the cuſtom they were not capable of being intailed, and no recovery could be ſuffered of them. The huſband and wife, by indenture of bargain and ſale to lead the uſes of a common recovery, declared, that the lands ſhould be to the uſe

5 Bacon Abr. 458. Lewis v. Lewis 2 Keyl. 449. 4 New Cases, 333

POLLEN *against* LORD MIDDLETON.

uſe of the huſband and his heirs; and afterwards ſuffered a common recovery in the court of common pleas.

The queſtion was, What effect the recovery had upon theſe copyhold lands?

HARDWICKE, *Lord Chancellor*. Though by the cuſtoms of ſeveral manors copyhold eſtates cannot be intailed, yet they are capable of ſuch limitations as may make them fee-ſimple conditional; and it will make no difference that ſhe is not ſeiſed of the legal eſtate, for the truſt eſtate of a copyhold can in no caſe be capable of an intail where the legal eſtate is not, it being neceſſary that there ſhould be the ſame rule concerning property in law and equity, though as to the manner of conveying eſtates ſome difference may be made. A court of equity will in many caſes diſpenſe with the ordinary forms in paſſing eſtates, but never introduce any rules that may vary the nature of them at common law. The wife, therefore, being tenant of a fee-ſimple conditional, had power to diſpoſe of it by ſurrender after the condition was performed, *i. e.* after iſſue. If the eſtate had been intailed, it would have been neceſſary to have barred the intail by ſome proper means, either by a recovery ſuffered in the lord's court, if the cuſtom of the manor had admitted of it, or by a ſurrender. And though the intail had not been of the legal, but of the truſt eſtate, all poſſible endeavours ought to have been uſed to have barred it in the ordinary way; and the rules of the common law in regard to the barring of ſuch eſtate-tail ought to have been purſued as near as poſſible, according to the caſe of *Otway v. Hutton* (*a*), where in the caſe of a tenant in tail of a copyhold eſtate with a remainder over, the truſtees refuſed to ſurrender the eſtate to him, and he brought his bill to compel them, and pending that ſuit he went to the lord's court and offered to ſurrender, but was refuſed, not having the legal eſtate; and thereupon he made his will, and deviſed his eſtate to his wife and children; the Court conceived the will ſufficient to bar the intail of a truſt, he having done all he could, and decreed the eſtate to go according to the will. But a recovery ſuffered in the court of common pleas would not have barred ſuch a truſt eſtate-tail as this in the principal caſe, ſuppoſing it to be an eſtate-tail, unleſs the truſtees had refuſed to ſurrender, &c. But taking this eſtate to be a fee-ſimple conditional at common law in truſt for the wife, as it really is, after the condition performed ſhe might have deviſed it, had ſhe been ſole, by will, which would have operated as a good appointment of the truſt; being a *feme covert*, ſhe has joined with her huſband in and executed a deed to make a tenant to the *præcipe*, and ſuffered a common recovery in the common pleas together with him, the uſes of which have been declared to be to the huſband and his heirs. Now it is certain, that a *feme covert* may, by a common recovery, convey her fee-ſimple land, as well as bar an eſtate-tail; for ſhe being ſecretly examined before the recovery is

(*a*) 2. Vern. 585.

ſuffered,

suffered, she is as effectually barred as she would be in the case of a fine. But besides this deed and recovery, the husband and wife have gone further; they have brought their bill in this court against the trustees to convey the legal estate, and a decree has been made for that purpose, which I am to suppose has been carried into execution: so that all has been done that could be done to transfer the estate to the husband. And I AM OF OPINION that it is well transferred; and I do not see how this differs from the devise of a trust copyhold estate, which has always been held good.

PULLEN *against* LORD MIDDLETON.

Wilkes and Others *against* Holmes. Case 164.

In Chancery, Easter Term, 25. Geo. 2. 1752.

IN A MARRIAGE-SETTLEMENT, after a limitation to the issue of the marriage, and of a jointure to the wife, a power was given to the husband and wife to raise two thousand pounds out of certain lands therein mentioned; and if no part, or only part of that sum should be raised in the life-time of the husband and wife, then that it should be lawful for the survivor of them, by his or her last will or testament in writing, *duly* executed, to raise two thousand pounds only for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for the children of the marriage, except an eldest son. The husband died without executing the power. The wife executed it by a will signed in the presence of only two witnesses.

Power, the definitive execution of one.

HARDWICKE, *Lord Chancellor*, made two points: FIRST, Whether this was a due execution of the power. SECONDLY, Whether, if it was not, the defect might be supplied by a court of equity.

As to the first his Lordship observed, that since the statute of Frauds no wills relating to lands can properly be said to be duly executed, unless it be in presence of three witnesses; and that to determine otherwise in this court would be a dangerous innovation: that though the will prescribed by the author of the power is a creature of his own, and the execution of it in the presence of two witnesses might have been good if he had thought fit to have ordered it so, yet as he has expressly directed that it shall be executed *duly*, he must be understood to have referred to some known rule, which, as he himself has mentioned none, can be construed to be no other than the rule of law; and that the statute of Frauds has furnished us with.

1. Wms. 741. 2. Wms. 258.

As to the second point his Lordship had great doubt, and said, there was much difference betwixt defective deeds and instruments *inter vivos* and defective wills: that the former might in many instances be aided where the latter could not.

But afterwards he was of opinion, that the defect in this case might be supplied. He said, where a will is to operate by way of appointment, it takes no effect from the statute, though

WILKYS AND OTHERS *againſt* HOLMES.

the rules preſcribed by the ſtatute may, as in this caſe, be arbitrarily inſerted by the party; and that the appointee cannot claim under the will, but by the deed of ſettlement directing the execution of the power; which deed, together with the inſtrument executing the power, make in effect but one in raiſing the charge upon the land; but that in point of law the charge is created by the deed directing the execution of the power: to which purpoſe is the argument of MR. JUSTICE POWELL in *Scatterwood v. Edge*. But to bring the matter ſtill nearer this caſe: If inſtead of the power to charge the lands with this ſum of money, it had been to create a term for this purpoſe, the party claiming the benefit of the term, if his right had been diſputed, muſt have pleaded the deed creating the power; ſo that the whole of this caſe muſt be taken on the deed and the power together. And the ſtatute of Frauds is entirely out of the queſtion, except ſo far as it is the rule which the appointee is directed to follow in the execution of the power It is objected, that at law as well as in equity a power relating to lands to be executed by will muſt be executed by a will purſuant to the ſtatute. This is true. So if a power is to be executed by deed, and there be any defect in this deed, it muſt fall to the ground. But this is to be underſtood only where the power is executed voluntarily: for if there be any meritorious conſideration, as the payment of debts, or a proviſion for younger children, this Court will interpoſe, and aid the defect. In the caſe of *Smith v. Aſheton*, 1. *Chan. Ca.* 264. where there was a defective execution of the power in point of circumſtance, yet the ſubſtance being performed, the Court held they might relieve. So in the principal caſe, the neglect is only in form and circumſtance. In the caſe of *Follett v. Follett*, 2. *Wms.* 489. the huſband had a power to make a jointure to his wife by deed; he made it by will; this defect was ſet right in equity; which determination goes a great way to decide the preſent queſtion; for why may not this defect be ſupplied, as in that caſe a deed be changed into a will? In the caſe of the *Duke of Marlborough v. the Earl of Carliſle*, *Michaelmas Term* 1750, there was no conſideration of merit to make the Court ſupply the defect. It has likewiſe been objected, that the debts which are to be paid by means of this power are the debts of the huſband, whereas the eſtate was originally the wife's; but thoſe debts are expreſsly provided for by the deed of ſettlement. *Ex relatione* BEATRUFFE,

1. Eq. Abr. 189.
1. Salk. 229.
12. Mod. 278.

2. Wms. 625.
Chan. Caſ. 89.

Caſe 165.

Adams *againſt* Danvers.

In Chancery, May 3, 1755.

DECREE, *June* 7, 1755.

Portion, when raiſable by ſale of a reverſionary term.

BY A DEED OF SETTLEMENT dated in *May* 1723, reciting a marriage between *John Palmer, jun.* and *Anne Danvers*, and that ſhe was intitled to have a portion of three thouſand pounds,

John

John Palmer the father conveyed lands to truſtees and their heirs to the uſe of *John Palmer* the ſon for life, remainder to *Anne* for her life for her jointure, remainder to truſtees to preſerve the contingent remainders, remainder to the firſt and every other ſon of *John Palmer, jun.* on the body of his ſaid wife, and for default of ſuch iſſue male, to the truſtees for a term of five hundred years, upon truſt, that in caſe at the time of failure of iſſue male of the ſaid *John Palmer, jun.* by the ſaid *Anne*, or at any time after, there ſhould happen to be any one or more daughter or daughters of their bodies, that the truſtees ſhould, by ſale or mortgage of the ſaid eſtate and term of five hundred years in the ſaid lands, and by and with the rents and profits thereof, *in the mean time and until ſuch ſale*, raiſe for the maintenance and portions of all ſuch daughter and daughters ſuch ſums as thereafter are mentioned, *viz.* if but one, three thouſand pounds to be paid at twenty-one or marriage, which ſhould firſt happen, and alſo the ſum of one hundred pounds yearly for her maintenance and education *in the mean time until ſuch portion ſhould be raiſed by ſale, by mortgage or ſale, or ſhould become payable as aforeſaid:* provided, that no ſuch mortgage or ſale ſhould be made until one or more of the ſaid portions ſhould become payable; and if the ſaid *John Palmer, jun.* ſhould in his life-time, or at his death, make a proviſion for ſuch daughter or daughters, or ſuffer lands of inheritance or goods of as great value to come to his daughters at any time during his life-time, or at his death, then the portions were not to be raiſed by the deed, and the term was to ceaſe and be void. Provided alſo, that if ſuch daughter or daughters ſhould die before her or their portion, &c. become payable, then it ſhould not be raiſed. *John Palmer, jun.* died in 1727, leaving iſſue only one child, a daughter, who married *Hargrave Adams* in 1741; and in the life-time of the mother, and whilſt the daughter was an infant of the age of ſixteen years, *Hargrave Adams* and his wife, by deed, dated the fourth of *February* 1741, reciting, that ſhe was intitled to the three thouſand pounds, that her huſband was going abroad, and that he was able to make no ſettlement upon her; and that the huſband was deſirous to ſettle this three thouſand pounds; therefore the huſband aſſigned the three thouſand pounds which was to be raiſed by the deed of 1723 to truſtees, to permit *H. Adams* to receive the intereſt and profits of it during the joint lives of himſelf and his wife; and if at their death they ſhould leave iſſue, then that the three thouſand pounds ſhould be paid and divided to and amongſt ſuch iſſue; and if there ſhould be none, or ſuch iſſue ſhould die, &c. that fifteen hundred pounds, part of the ſaid three thouſand pounds, ſhould be paid to ſuch perſon as *Anne Adams* ſhould by her will appoint; and for want thereof, then that it ſhould be paid to *her mother Anne Palmer* (as the mother was a party to this deed); and as to the remaining fifteen hundred pounds, this was to be paid to *H. Adams*, his executors or adminiſtrators.

ADAMS *against* DANYERS.

Hargrave Adams died without iſſue ſoon after; and before he went abroad, his repreſentative now brought his bill to have the three thouſand pounds and intereſt raiſed in the life-time of *Anne Palmer* the mother, by ſale or mortgage of the term of five hundred years, and that it might be diſpoſed of according to the deed of the fourth of *February* 1741. The other bill was brought to have the three thouſand pounds and intereſt raiſed and paid to the repreſentatives of *Anne Adams*, who claimed the whole, and diſputed the deed of the fourth of *February* 1741. The remainder-man who claimed under the deed of ſettlement in 1723 was a defendant, and inſiſted the three thouſand pounds portion was not raiſable in the life-time of the mother.

On the ſeventh of *June* 1755, this cauſe came before the Court upon an appeal from a decree made by STRANGE, *Maſter of the Rolls*, and this day THE LORD CHANCELLOR gave his judgment.

HARDWICKE, *Lord Chancellor*. Here are two queſtions: FIRST, Whether this three thouſand pounds is now raiſable by ſale or mortgage in the life-time of the mother? SECONDLY, If raiſable, To whom it belongs? Whether the whole to the daughter, late *Mrs. Adams*, and now *Mrs. N*——? or is it ſubject to the aſſignment made by the deed of the fourth of *February* 1741, and one moiety of it will belong to the repreſentatives? I AM OF OPINION with THE MASTER OF THE ROLLS upon both points.

FIRST, This queſtion depends upon a point which has gone through various determinations, until LORD COWPER made a ſtand in the caſe of *Corbett v. Maidwell* (*a*). Nothing tended more to the detriment of families, to the promoting of undutifulneſs of children, nor to the ruin of family eſtates, than the rule which prevailed before this caſe: The Court, ſeeing it, had a remorſe of judgment, as *Hobart* calls it. I ſhall not go back to conſider the old caſes. *Graves v. Mattiſon* (*b*) is the firſt of them; and it is a ſtrong caſe. After this was *Stainforth v. Stainforth* (*c*) and *Gerard v. Gerard* (*d*). The ground theſe caſes went upon was, that if the child ſhould wait until the death of its father or mother for the payment of their portion, they could not have the portion when it might be moſt uſeful to them, as to prefer them in marriage, &c. Theſe caſes are now quite exploded. In *Corbet v. Maidwell*, the Court did not indulge the ſame latitude of conſtruction; and in *Reresby v. Newland* (*e*) and *Broome v. Berkley* they have done it ſtill leſs. Upon this laſt caſe I ſhall chiefly ground my opinion; and if this caſe comes within the reaſon of that, I am bound to determine according to it. And in this I ſhall not act contrary to the notion and ſenſe of modern conveyancers, who provide, that portions ſhall

(*a*) 1. Eq. Caſes Abr. 337. Salk. 159. 2. Vern. 640. 3 Chan. Rep. 190.
(*b*) 2. Jones, 201.
(*c*) 1. Eq. Abr. 337. 3. Vern. 480.
(*d*) 2. Vern. 458. 2. Freem. 271.
(*e*) 2. Peer. Wms. 99.

not

not be raiſed till the term takes effect in poſſeſſion. And I dare ſay no huſband, upon executing ſuch a ſettlement as this, ever thought his child could come in his life-time and demand his portion. I AM OF OPINION, there is no warrantable diſtinction between this caſe and that of *Broome v. Berkley.* ADAMS *againſt* DANVERS.

The rule is, that if a reverſionary term or eſtate be limited to truſtees to raiſe portions at a certain time, when that time comes the portion muſt be raiſed, unleſs on a declaration of the truſt of the term the intention of the parties appears to the contrary. 2. Wms. 486. by the Maſter of the Rolls.

Here the intention of the parties appears to be, that the portions ſhall not be raiſed either in the life-time of the father or mother: the father is made tenant for life of the whole eſtate, and the whole eſtate is limited to the mother for life. In jointure, I think there is no difference between making the reſtriction part of the declaration of the truſt of the term and inſerting it as part of a negative proviſo, for the whole muſt in conſtruction be taken together.

FIRST, Whether raiſable in the life time of the father?

OBJECTION. The portion would have been raiſable in the life-time of the father in caſe the mother had died firſt, for then there would have been a failure of iſſue male.

I ſay it would not; for the father had during his whole life-time, by the proviſo in the ſettlement, to make a proviſion for his daughter; and therefore the daughter could not demand this three thouſand pounds againſt him.

But LORD MACCLESFIELD's opinion upon the proviſo in *Rereſby v. Newland*, 2. *Wms.* 101. that if the father provide for the daughter a portion equal to what is ſecured by the ſettlement, then the term to be void, has been objected; becauſe, ſays LORD MACCLESFIELD, by this it ſeems it muſt be intended, if the father provices ſuch portion payable at ſuch time as the portion by the ſettlement is made payable. But this proviſo is not capable of the ſame anſwer; for this clauſe in the proviſo goes further than that did; for the words are, "if lands or goods during his life, or at "his death, come to the daughters, of equal value, her portion "ſhall not be raiſed."

SECONDLY, Whether raiſable in the life-time of the mother?

To this the proviſo above is not applicable; it only affords an argument againſt raiſing it.

It has been objected by MR. ATTORNEY-GENERAL, that the words of the truſt term muſt be conſtrued diſtributively, *reddendum ſingula ſingulis.* I think they muſt. The portion to be raiſed by ſale or mortgage, and the maintenance, as the words are, in the mean time, and until ſuch ſale, by rents and profits. The manner of expreſſion both before and after ſhews it to be ſo, "in the mean time, and until ſuch ſale," *the ſame in both.* So alſo

ADAMS *againſt* DANVERS.

alſo are "the application of the rents in the mean time, and until "the portion ſhall be raiſed by ſale or mortgage, or ſhall become "payable as aforeſaid." And here is a proviſo, that "no ſale or "mortgage ſhall be made until ſome one or more of the portions "ſhall become payable." How then was the maintenance to come but of the rents and profits? And how could this be during the life of the father or mother? The term was not to take effect in poſſeſſion until they both were dead; and here the maintenance is moſt clearly to precede the portion; and therefore the maintenance is to be paid before it; and as the maintenance cannot take place during the life of either father or mother, the conſequence is, that the portion cannot. Is not this then the very ſame caſe as that of *Broome v. Berkley* (*a*), in *Peere Williams*, where the caſe is truly ſtated? But it is ſaid, the words are not the ſame; but there is the ſame form of expreſſion in both. Indeed in that caſe there are expreſs words, "that the maintenance ſhall not take "place until the term takes effect in poſſeſſion." The difference between the two caſes is merely in words; the intent, meaning, and import of the two ſettlements are the ſame: and the rule laid down by the Maſter of the Rolls in *Broome v. Berkley* is the true rule in theſe caſes.

The ſecond queſtion depends upon the deed of the fourth of *February* 1741.

It has been ſaid, as the huſband had a right to this three thouſand pounds, as he might aſſign it or releaſe it, and as the proviſion made was a reaſonable one, and what, if brought before the Court, would at that time have been allowed, it ſhould be ſo now.

But conſider the circumſtances of the parties and the deed itſelf. The wife was an infant under age, and married a man that was worth nothing. No proviſion whatſoever was made for her or her children before the marriage, but after the marriage this deed was made, which recites, that the huſband was then going abroad, that he was not able to make any proviſion for his wife; then it goes on, and ſays, "that he (alone) was deſirous to ſettle, &c. and therefore "he aſſigns, &c." The whole intereſt he reſerves to himſelf during their joint lives; and though he was going abroad, and his wife confeſſedly had no other proviſion, yet nothing is reſerved for her, but, in caſe there ſhould be no iſſue, a power (and which ſhe is reſtrained to execute by will only) of diſpoſing of fifteen hundred pounds, part of the three thouſand pounds, the other is to go to the huſband and his repreſentatives abſolutely. I am of opinion, this deed ſhould be ſet aſide; I do not think the proviſion reaſonable; and I think the benefit which is limited to ſurvive to the mother ſuch, as ſhe is the friend by nature moſt to be relied on in taking care of the intereſt of her child, that for example ſake it ought to be ſet aſide. This Court always takes care of the intereſt of *the wife*. As to the huſband's power over her eſtate, it was held in

(*a*) 2. Peer. Wms. 484.

Bates

Bates v. Danby, that he might aſſign it for a valuable conſideration; but ſo far as his aſſignment was voluntary, the Court there decreed ſo much belonged to the wife who ſurvived. Here is no valuable conſideration, it is voluntary; which brings it to the queſtion, Whether reaſonable? And I am of opinion it was not. There was no reaſon to give the huſband fifteen hundred pounds although the wife ſurvived. Here is nothing reſerved for her, or for her ſeparate maintenance during her huſband's abſence. If this had gone before the Maſter, he would not have divided thus. The huſband could not have the portion without the aſſiſtance of this Court, neither can his repreſentatives. If ſhe made no diſpoſition by will, it was to go to the mother; and ſhe is tied up to do it by will; and the mother, the principal friend to be relied on to take care of her daughter's intereſt, has unwarrantably ſtipulated for a benefit for herſelf. AND THEREFORE I AM OF OPINION, the whole decree muſt be affirmed upon both points *(a)*.

(a) See Churchman *v.* Harvey, Amb. 335. Stephens *v.* Dethick, 3. Atk. 39. Sandys *v.* Sandys, 1. Peer. Wms. 707. Heblethwaite *v.* Cartwright, Caſes T. T. 31. Stanley *v.* Stanley, 1. Atk. 549. Hall *v.* Carter, 2. Atk. 354. Lyon *v.* the Duke of Chandos, 3. Atk. 416. Smith *v.* Evans, Amb. 633. Conway *v.* Conway, 3. Brown's Caſes Ch. 267.

Bowles *againſt* More. Caſe 166.

At the Rolls, Trinity Term, 1755.

LADY ANNE MORE having a power, notwithſtanding her coverture, to diſpoſe of her eſtates, one in *Bedfordſhire* and the other in *Lincolnſhire*, and alſo of four thouſand pounds, made her will the tenth day of *November* 1716, and thereby (amongſt other things) deviſed in manner following: "I will, direct, and appoint, "that upon my deceaſe the ſum of four thouſand pounds be paid to "truſtees to be placed out by them at intereſt; and that the rents "of her ſaid eſtates be alſo paid to them; IN TRUST to pay there-"out ſeveral annuities amounting to two hundred pounds *per annum*." And then follow theſe words: "And as to the four "thouſand pounds, I give it, and hereby appoint and direct, that if "all the ſaid annuitants are deceaſed, the principal ſum ſhall be then "divided equally to and amongſt all the children of my ſaid ſon "*Joſeph Edmonds More*, except his eldeſt ſon. But my will is, "that if any one or more be then under the age of twenty-one "years, that the part or proportion of every ſuch minor child or "children be managed for his, her, or their benefit till twenty-one "years; and in caſe any one or more ſuch younger children die "before the deceaſe of all the annuitants, and leave iſſue, I will "and direct, that the ſhare or part which ſhould have belonged to "ſuch child or children ſo dying ſhall go and belong to the iſſue of "the deceaſed; and in caſe there ſhall not be any younger child or "children of my ſaid ſon *Joſeph Edmonds More*, nor iſſue living of "any of them at the deceaſe of the ſurvivor of all the ſaid annuitants, "then in that caſe I give and diſpoſe of, limit and appoint, the four "thouſand

Bowles against More.

" thouſand pounds, and the ſaid ſeveral eſtates in the counties of " *Bedford* and *Lincoln*, as followeth *(i. e.)* My will is, that the per- " ſon who ſhall then be the eldeſt ſon of my ſaid ſon *Joſeph Edmnds* " *More* ſhall have both the ſaid *Lincolnſhire* and *Bedfordſhire* eſtates " to him and his heirs for ever."

Lady Anne More died in the year 1720, leaving three younger children of her ſon *Joſeph Edmonds More*; and after, in the year 1730, *Thomas More*, another younger child, was born; and *Joſeph Greenhill*, the laſt ſurviving annuitant, did not die until the twenty-fifth of *March* 1746.

The queſtion was, Whether *Thomas More* was intitled to any ſhare of this four thouſand pounds?

The objection was, that he could not, as he was neither *in eſſe* nor *en ventre ſa mere* at the death of *Lady More*, when the will muſt operate, and when the legacy was to take effect and veſt in the children; and the rather, as the intereſt was only deviſed to the children.

The Master of the Rolls. It is to no purpoſe to cite caſes upon this head. Every caſe of this ſort muſt depend upon its own circumſtances, and be ruled upon them and the intention of the deviſor. The words underlined plainly ſhew, that *Lady More* intended he ſhould have his ſhare, and that the legacy was not to veſt or be paid until the death of the laſt annuitant. If the three younger children had died, and there had been only *Thomas More* ſurviving when the laſt annuitant died, he muſt have taken; for the deviſe over could not take by the words ſo long as there was any younger children of *Joſeph Edmonds More* in being.

A TABLE

A

TABLE

OF

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8. *A.* deviſes his lands to truſtees for payment of debts and legacies, and after to *B.* in tail male. *B.* ſuffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and alſo of a bond of 200l. charged on the ſaid eſtate; on which *B.* covenants with truſtees, by articles, that in conſideration of the intended marriage,

marriage, and of the portion of 3000l. and bond of 200l. to ſettle a jointure upon *C.* of one-third of the deviſed eſtate, which was about 300l. a-year, in bar of dower: the marriage took effect, and the wife ſurvived; but her *choſes in action*, being the conſideration of the ſettlement, ſhall not ſurvive in equity, *Seys v. Price*, 217

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1. If in conſideration of a wife's fortune, conſiſting of *choſes in action*, a huſband ſettles an eſtate inadequate to ſuch fortune and the degree of his wife, a court of equity will not take away the right which the law gives the wife to *choſes in action*, *Seys v. Price*, 217

2. *A.* deviſes his lands to truſtees for payment of debts and legacies, and after to *B.* in tail male. *B.* ſuffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and alſo of a bond of 200l. charged on the ſaid eſtate; on which *B.* covenants with truſtees, by articles, that in conſideration of the intended marriage, and of the portion of 3000l. and bond of 200l. to ſettle a jointure upon *C.* of one-third of the deviſed eſtate, which was about 300l. a-year, in bar of dower: the marriage took effect, and the wife ſurvived; but her *choſes in action*, being the conſideration of the ſettlement, ſhall not ſurvive in equity, *Seys v. Price*, 217

3. A *choſe in action* of the wife's before marriage, and charged upon the huſband's eſtate, ſhall not, after the death of the huſband, ſurvive, but ſhall be conſidered as merged, *Seys v. Price*, 220

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1. Not obliged to account ſo ſtrictly, and ſo far back as common perſons are, *Attorney General v. Baliol College, Oxford*, 409

2. College made a leaſe, the rent ſubject to taxes; the tenant, by miſtake, did not deduct them; equity will not allow him thoſe already paid, nor decree the account back, *Attorney General v. Baliol College, Oxford*, 410

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They made a wrong aſſeſſment, and the complainant by their warrant diſtrained, for which he was ſued. This court would not relieve, *Bow v. Smith*, 94, 95

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1. Though there was no legal tenant to the *præcipe* in order to ſuffer a common recovery, yet after length of time it ſhall be preſumed there was a legal tenant, *Webber v. Montagh*, 143

2. A papiſt being tenant in tail ſuffered a common recovery, and declared the

the uſes to himſelf and his heirs; and held, this was not a purchaſe within the ſtatute 11. & 12. Will. 3. *Lord Derwentwater's Caſe*, 172, 173

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1. On a deviſe of ſo much money to a *feme ſole*, "provided ſhe marry with "the conſent of her father and mother, "or the ſurvivor of them," the marriage is a *condition* to the payment of the legacy, *Garbut v. Hilton*, 216

2. *A.* by will gives his daughter 1000l. to be paid at twenty-one or marriage, provided ſhe marry with the conſent of executors; if any of the executors die, the condition is void, *Graydon v. Hickes*, 215

3. But if a legacy be given to *A.* with condition that if ſhe ſhall marry before twenty-one without the conſent of the executor, then to *B.* &c. the executor renouncing, yet his conſent is neceſſary to ſave the condition, *Graydon v. Hickes*, 216

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1. Caſes referred to where a court of equity will ſet aſide a conveyance obtained from a perſon of a weak mind, &c. 303. *notis*

2. In what caſes a court of equity will ſet aſide a conveyance for fraud, impoſition, and undue influence, *Bennett*, &c. *v. Vade*, &c. 312

3. If conveyance is ſet aſide for fraud, and it was good at law, and the grantor was obliged to come into chancery, he ſhall not be relieved without doing equity, by allowing laſting improvements, *Attorney General v. Baliol College, Oxford*, 412

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Copyholds will paſs by a deviſe of "real "eſtate," *Atcherley v. Vernon*, 75

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If lands are given to corporate bodies, and corporation leaſes, or is diſſolved, the land will not eſcheat, but will revert to the donors, *Attorney General v. Lord Gower*, 226

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2. Pariſhioners ordered to pay coſts on a ſuit for tithes, *Smithſon v. Dodſon*, 118

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COVENANTS.

1. A covenant, that if the eſtate was to be ſold the mortgagee ſhould have the benefit of pre-emption; but not being claimed before the eſtate was ſold, the benefit of the covenant was loſt, *Orby v. Trigg*, 2, 3

2. A man covenanted for himſelf and his heirs to ſurrender a copyhold eſtate to

ſuch uſes, and died before it was done; but on a bill againſt the heir for a ſpecial execution of the covenant, it was decreed accordingly, *Neave v. Keck*, 106, 107

3. Leſſee for years covenants not to alien without licence of the leſſor, under penalty of forfeiting the leaſe; if he after aliens without licence, equity will not relieve him, *Wafer v. Moccatte*, 112

4. In what caſes covenants in a leaſe are to be underſtood as covenants of perpetual renewal, or not, *Furnival v. Crew*, 446

5. Where a man covenants to lay out a ſum of money in the purchaſe of lands, and deviſes his real eſtate before he has made ſuch purchaſe, the money to be laid out will paſs to the deviſee. Caſes cited, 78. *notis*

6. But where *A.* deviſed "all his real "and perſonal eſtate," and *afterwards* articled to purchaſe lands, and then died, the heir at law was held to be entitled to this eſtate, as not paſſing by the will. Caſes cited, 78. *notis*

7. If *A.* in conſideration of marriage, covenant to ſettle his eſtate, within two years, to the uſe of himſelf for life, without impeachment of waſte, with remainder to his wife for life, remainder to his heirs male in tail ſpecial, remainder to the heirs of the body of ſuch heirs male, with remainder to his own right heirs; and that he ſhould ſtand ſeiſed to the ſaid uſes until a ſettlement ſhould be made; and then, without making the ſettlement, levies a fine, and afterwards declares different uſes, and dies, leaving a large eſtate to deſcend to his eldeſt ſon, to whoſe uſe no part of the eſtate was declared under the fine; EQUITY will decree *a ſettlement* to be made purſuant to the uſes declared in the marriage-articles, *Trevor v. Trevor*, 161

COURTS.

1. COURT OF CHANCERY, its juriſdiction, &c. (*See* BILLS, JURISDICTION, RELIEF.)

2. COURT OF EXCHEQUER. A decree was in the court of exchequer againſt tenant for life, to hinder him from committing waſte; which decree was founded on a deed of ſettlement; and on a bill in chancery to ſet that deed aſide, the defendant pleaded the decree in the exchequer, but was over-ruled, *Wing v. Wing*, 109, 110

3. DUCHY COURT. A bill in the duchy court for lands demurred to, becauſe it did not aver that the lands lay within the duchy, it being a circumſcribed juriſdiction, *Lord Coningſby's Caſe*, 95

CREDITORS.

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CURTESY OF ENGLAND.

1. Where the huſband ſhall be tenant by the curteſy of *England*, or not, *Boothby v. Vernon*, 147 to 151

2. Deviſe to the wife for life, remainder to the iſſue male of her body, and to the heirs male of ſuch iſſue male, remainder over: ſhe had iſſue a ſon, who died in her life, and then ſhe dies, but being heir at law to the teſtator, the reverſion in fee deſcended on her; and yet decreed, her huſband ſhould not be tenant by curteſy, *Boothby v. Vernon*, 148

CUSTOMS OF LONDON, &c.

A freeman of *London* having one daughter, and ſeveral grandchildren by her, deviſed his perſonal eſtate to pay debts and legacies; and afterwards what remained to be ſold, and the intereſt of the money to be paid to his ſaid grandchildren, ſhare and ſhare alike, till of age, but did not diſpoſe the principal ſum, which the daughter and her huſband claim by their bill, *Newland v. Shepherd*, 57, 58

D.

DEBTS, DEBTORS, AND CREDITORS.

1. A goldſmith's note given in part of payment on *Saturday*, but not offered to

to the drawer till *Monday* following, is no new credit given to the drawer, but the indorſor is ſtill liable, *Mead v. Caſwell*, 60

2. A creditor cannot ſue one co-executor alone without the other, *Scurry v. Morſe*, 89

3. The obligor, on payment of 20l. to the obligee, procured a bond and notes for money to be delivered up to him, on pretence he was poor, and nearly related to the obligee; but that pretence not being proved, he was ordered to account for the bond and notes, *Lucas v. Adams*, 118, 119

4. Lands given in truſt, or deviſed to pay debts and legacies, to be deemed as money in reſpect to creditors, but not in reſpect to the heir at law or reſiduary legatee, *Roper v. Radcliffe*, 171

5. A creditor on ſecurity, and at the ſame time tenant of an eſtate, ſhall not be obliged, unleſs there is a particular agreement to that purpoſe, to take his debt by driblets, *i. e.* to take the overplus of the rent in his hands in part of payment to reduce the principal after deduction of the intereſt due on his debt, *Wilkinſon v. Sterne*, 299

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DECREE.

1. A decree for confirming or avoiding a will, where an infant is heir or deviſee, is final, *Whitechurch v. Whitechurch*, 128

2. An infant bound by decree, *Charles v. Andrews*, 153

3. A promiſe, though not in writing, decreed to be performed, *Alliſon's Caſe*, 63.

4. See alſo *Hoſier v. Read*, 86

5. Pending a ſuit by the creditors againſt the mortgagor to ſell, &c. the mortgagee got a decree to foreclоſe; but decreed the mortgagor and creditors might redeem on payment of principal, intereſt, and coſts, and that the lands ſhould be ſold to pay the creditors, *Soley v. Saliſbury*, 153

6. See a decree made in the exchequer pleaded in chancery, and over-ruled, *Wing v. Wing*, 109, 110

7. An agreement in writing loſt, but confeſſed in the anſwer; decreed to be executed, *Hoſier v. Read*, 86

8. See a decree of commiſſioners of charitable uſes reverſed in chancery, *Wright v. Hebert*, 64, 65

DEEDS AND CONVEYANCES.

1. An agreement in writing being loſt, but confeſſed in the anſwer, ordered to be executed, *Hoſier v. Read*, 86

2. Deeds were ordered to be brought into court to be inſpected by the plaintiff, in order to make out his title, *Floire v. Sidenham*, 99

3. The defects of deeds ſupplied in equity, *Alliſon's Caſe*, 63

4. See alſo *Hoſier v. Read*, 86

5. See alſo *Charles v. Andrews*, 152

6. One covenants by deed to ſurrender a copyhold, but dies before the ſurrender made; but decreed the heir ſhould ſurrender, *Neave v. Keck*, 106, 107

7. A decree was made in the court of exchequer againſt tenant for life, to hinder him from committing waſte, which decree was founded on a deed of ſettlement; and upon a bill now brought to ſet that deed aſide, the defendant pleaded the decree in the exchequer, which was over-ruled, *Wing v. Wing*, 109

8. So articles for ſale of an eſtate were decreed to be performed, *Charles v. Andrews*, 151, 152

9. In deeds, as well as wills, where it appears that the word *heirs* ſhould be underſtood as a word of purchaſe, this court will decree it ſo, *Hodſell v. Buſſell*, 238

DEFENDANT.

1. Where a defendant is intereſted in the having another made a defendant, the plaintiff muſt make ſuch a defendant; but where the plaintiff only is affected, he may or may not make ſuch party a defendant, at his pleaſure, *Williams v. Williams*, 299

2. Equity makes a great difference where a man is plaintiff or defendant in that

court, *Attorney General v. Baliol College, Oxford*, 411

3. Defendant is not obliged to diſcloſe any fact which would tend to ſubject him to a corporal puniſhment or a pecuniary penalty, or endanger a loſs of office, *Selwyn v. Honeywood*, 419

4. In what caſes the court of chancery will admit the defendant's teſtimony, *Meadbury v. Iſdall and Freind*, 438

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Demurrer to a bill in THE DUCHY COURT, that it did not aver that the lands lay within the duchy, allowed, *Lord Coningſby's Caſe*, 95

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See depoſitions taken *de bene eſſe* before the defendant had anſwered or iſſue joined, *Southwell v. Lord Limerick*, 133

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Alteration of deſcent, *Stringer v. New*, 363

DEVISES, WILLS, &c.

1. A deviſe to the eldeſt ſon of his eldeſt ſon in tail male, and for want of ſuch iſſue to his ſecond ſon in tail male, he ſhall take immediately, *Gore v. Gore*, 45

2. A deviſe of 5l. to a ſole executor, "for the care and pains he may ſuſtain in fulfilling the truſts of the "will," excludes him from taking the reſidue of the teſtator's perſonal eſtate, *Raſhfield v. Carelſs*, 9

3. If a father deviſe lands to truſtees and their heirs until his ſon attain the age of twenty-five, a mortgage made by the ſon when only twenty-one is void, *Spencer v. Chaſe*, 30

4. A *freeman of London* having one daughter, and ſeveral grandchildren by her, deviſed his perſonal eſtate to pay debts and legacies; and afterwards what remained to be ſold, and the money ariſing by ſale, *viz.* the intereſt, to be paid to his grandchildren, ſhare and ſhare alike, until of age, but did not diſpoſe the principal ſum; and now his daughter, who was heir at law, and her huſband, exhibited a bill to have the principal, *Newland v. Sheppard*, 57

5. A deviſe of lands to his ſecond ſon, *and his heirs* for ever, and for *want of ſuch heirs*, then to the right heirs of the teſtator, who died, and ſo did the ſecond ſon without iſſue, living his elder brother: adjudged, that the ſecond ſon had an eſtate-tail, and no more, becauſe thoſe words, *and for want of ſuch heirs*, are void in point of limitation, and import no more than *want of ſuch iſſue*, becauſe the ſecond ſon could never die without heirs ſo long as his brothers, or any heirs of his father, were living; therefore the heir at law, in this caſe, ſhall take by deſcent, and not by the will, *Nottingham v. Jennour*, cited, 71

6. If a man deviſe all his real and perſonal eſtate to truſtees, and afterwards purchaſes a *fee-farm rent* iſſuing out of his manor, and *contracts* for the purchaſe of *land*, and pays part of the purchaſe money, but before the contract is completed makes a codicil, whereby he deviſes "all the *lands* by me purchaſed "ſince the publiſhing of my will to "the truſtees in my will named;" and then revokes the will as to two of the truſtees, and appoints two others; the fee-farm rents and after purchaſed lands, although the purchaſe be not completed at the time of his death, and alſo all his before-deviſed real eſtate, paſs; for the *codicil* is a *republication* of his *will*, *Acherley v. Vernon*, 71, 72

7. If a man poſſeſſed of *freehold*, *leaſehold*, and *copyhold* lands, deviſe "all his "real eſtate to truſtees," without mentioning his *copyholds*, yet if it appear by a codicil to have been the intention of the teſtator, the copyholds ſhall paſs accordingly, and not reſult to the heir at law, *Acherley v. Vernon*, 72

8. Teſtator had agreed for the purchaſe of a copyhold, and purſuant to that agreement a ſurrender was made out of court to his uſe; then he deviſed "all "his lands to *R. B. &c.*" and died before admittance: decreed, that the copyhold lands ſhall paſs, becauſe the teſtator had a title in equity to recover them,

them, and the vendor ſtood ſeiſed for him till a legal conveyance could be made, *Davy v. Beardſham*, cited, 75. *in notis*

9. If a perſon article to buy certain lands, he thereby becomes ſeiſed thereof in equity, and they will paſs by a *ſubſequent* deviſe of "all his lands of inheritance." Caſes cited, 78. *notis*

10. Deviſe by a father to his two daughters carries a fee-ſimple, *Carpenter v. Chapman*, 92

11. Lands deviſed to his wife and her heirs, to be ſold for payment of debts and legacies in aid of the perſonal eſtate, and not being ſold, if the perſonal eſtate is ſufficient to diſcharge the whole, the heir ſhall have the lands as a reſulting truſt, *Buggins v. Yates*, 122

12. Deviſe void for uncertainty, *Buggins v. Yates*, 122

13. Deviſe to the wife for life, remainder to the iſſue male of her body, and to the heirs male of ſuch iſſue male, remainder over; ſhe had iſſue a ſon, who died in her life-time, and then ſhe died; but ſhe being heir at law to the teſtator, the reverſion in fee deſcended on her: decreed, that her huſband ſhall not be tenant by the curteſy, *Boothby v. Vernon*, 147

14. A deviſe of "all my real and perſonal eſtate to *A.* in truſt to pay debts "and legacies, the reſidue to be laid "out in lands to the uſe of *B.* and *C.* "and the *ſurvivor* of them, their heirs "and aſſigns, for ever, *equally to be* "*divided* between them, ſhare and ſhare "alike," creates a joint-tenancy, *Barker v. Giles*, 157

15. Deviſe of lands to a papiſt is a purchaſe within the meaning of the act 11. & 12. Will. 3. c. 4. to prevent the growth of popery, *Roper v. Radcliffe*, 167

16. If perſonalty be deviſed to a wife, and ſuch child as ſhe ſhall be *enceinte* with at her huſband's death, and in caſe ſhe die without iſſue by him, upon her death a deviſe over, this is a good executory deviſe, *Evit v. Williams*, 209

17. On a deviſe of ſo much money to a *feme ſole*, "provided ſhe marry with the "conſent of her father and mother, or "the ſurvivor of them;" the marriage is a *condition precedent* to the payment of the legacy, *Garbut v. Hilton*, 210

18. *A.* deviſes his lands to truſtees for payment of debts and legacies, and after to *B.* in tail male: *B.* ſuffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and alſo of a bond for 200l. charged on the ſaid eſtate; on which *B.* covenants with truſtees, by articles, that in conſideration of intended marriage, and of the portion of 3000l. and bond of 200l. to ſettle a jointure upon *C.* of one third of the deviſed eſtate, which was about 300l. *per annum*, in bar of dower. The marriage took effect, and the wife ſurvived; yet her *choſes in action*, being the conſideration of the ſettlement, ſhall not ſurvive in equity: and this a good ſettlement, according to 27. Hen. 8. c. 10. to bar the wife of her dower. But if, in conſideration of the wife's fortune, which conſiſted of *choſes in action*, a huſband ſettles an eſtate inadequate to ſuch fortune and the degree of the wife, a court of equity will not take away that right which the law gives the wife to *choſes in action*, *Seys v. Price*, 217

19. A deviſe of real and perſonal eſtate to the attorney who made the will, *Pomfret v. Murray*, 230

20. A deviſe of a term of years to the mother for life, remainder to the daughter, is an executory deviſe, *Theobalds v. Duffoy*, 102

21. Lands deviſed to his wife and her heirs, to be ſold for payment of debts and legacies in aid of the perſonal eſtate, and not being ſold, if the perſonal eſtate is ſufficient to pay the whole, the heir ſhall have the land as a reſulting truſt, *Buggins v. Yates*, 122 to 124

22. Lands given in truſt, or deviſed to pay debts and legacies, ſhall be deemed as money in reſpect to creditors, but not in reſpect to the heir at law or reſiduary legatee, *Roper v. Radcliffe*, 171

23. By a deviſe of the *reſiduum*, the inheritance paſſes, *Carpenter v. Chapman*, 92

24. Deviſe

24. Deviſe of a legacy to his grandchildren, if they arrive at twenty-one, or marry, *Burdett v. Young*, 93

25. Deviſe to the mother for life, remainder to her children; ſhe had then one child; and about four years afterwards he makes a codicil, when ſhe had two children more, who died: they all took an eſtate in fee as tenants in common, *Bateman v. Roach*, 104, 105

26. Deviſe, that he did not doubt but his wife would be kind to his children, is void for uncertainty, *Buggins v. Yates*, 122, 123

27. The huſband deviſed his real eſtate to his three daughters and their heirs, and then by a codicil deviſed it to his wife, if his three children ſhould die without iſſue, and made her guardian to the children; ſhe married again; the guardianſhip was taken from her by the Court, *Morgan v. Dillon*, 135, 136

28. The mortgagee had a term for five hundred years, and after took another term of the ſame lands for one thouſand years in the name of a third perſon, to commence after the determination of the firſt term, and then purchaſes the fee-ſimple in his own name, and then deviſed the lands to *E. G.* for life, remainder in tail, &c. this will was void as to paſs the lands, becauſe not atteſted by three witneſſes; but then it was inſiſted, that it was good for the one thouſand years as a term in groſs; but it was decreed to be a term attending on the inheritance by implication of law, &c. *Whitchurch v. Whitchurch*, 124, 125

29. Contradictory clauſes in a will ſhall be ſo expounded as to make all conſiſt, *Adams v. Clerke*, 154

30. A deviſe by *a papiſt*, in truſt to *papiſts*, of lands "to be ſold for the payment "of debts and legacies, and the reſidue "to be paid to *A. a papiſt*, when ſhe "ſhall attain her age of twenty-one "years, or be married with the conſent of the ſaid truſtees," is a good deviſe, notwithſtanding the ſtatute 11. & 12. Will. 3. c. 4. if the deviſee conforms to the proteſtant church within ſix months after ſhe attains the age of eighteen years, *Hill v. Filkins*, 154

31. A will ſhall not be eſtabliſhed againſt an heir at law, without a trial at common law, *Dawſon v. Chater*, 90

32. Where collateral proof ſhall be admitted to ſhew the intent of the teſtator, *Raſhfield v. Careleſs*, 9

33. See alſo *Barker v. Giles*, 159

34. Deviſe by a mortgagor or *ceſtui que truſt* good, without ſurrender of copyhold, *Gibſon v. Stiles*, 267

35. A deviſe of lands *for ever* conveys an eſtate in fee, and is not affected by ſubſequent words requeſting the deviſee, "in caſe of failure of iſſue of his ſaid "body," to give the eſtate to another, *Bland v. Bland*, 478

36. The court of chancery will not order a deviſee of land to make ſatisfaction to the heir for monies laid out by the teſtator, on a notion that he was poſſeſſed of an eſtate in fee, *Ellinor v. Garton*, 480

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1. Dower cannot be barred but by an expreſs intention of the parties, *Charles v. Andrews*, 152

2. What ſhall be a good ſettlement to bar the wife of her dower, according to 27. Hen. 8. c. 10. *Seys v. Price*, 217

DUCHY.

See COURT.

E.

EAST INDIA COMPANY.

In what caſes the court of chancery will or will not permit the books of the *Eaſt India*

India Company to be inſpected, *Steward v. Eaſt India Company*, 387

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1. Whether a monk profeſſed is capable of taking an eſtate, *Anderton v. Commiſſioners of Forfeited Eſtates*, 54

2. If a *Dutchman* be poſſeſſed of real eſtate in *Holland*, and perſonal eſtate in *England*, and deviſe his real eſtate to *A.* and his perſonal to *B.* the perſonal eſtate ſhall be firſt applied to pay his debts in *Holland*, though real eſtate there is liable to debts, *Anonymous*, 66

3. A term for years is a leſs eſtate than an eſtate for life, and why it is ſo, *Theobalds v. Duffey*, 102

4. A wife poſſeſſed of a term, by marrying an alien, does not inveſt him in her eſtate, *Theobalds v. Duffey*, 104

5. A deviſe to the mother for life, remainder to her children, &c. ſhe having then but one child; about four years after, when ſhe had two more (who after died) he makes a codicil to the will, and held that all the children had an eſtate in fee as tenants in common, *Bateman v. Roach*, 104, 105

6. A papiſt tenant in tail ſuffered a common recovery, and declared the uſes to himſelf and his heirs; this is not a purchaſe within 11. & 12. *Will.* 3. for it is no acquiſition of a new eſtate, but only a modification of the old family eſtate, *Lord Derwentwater's Caſe*, 172, 173

7. The perſonal eſtate muſt come in aid of the real, *Anonymous*, 66

8. If an eſtate is given to a father for the benefit of his children, to be paid them at twenty-one, and the father has no child, it ſhall remain in him for his own benefit abſolutely, *Salt v. Chambers*, 260

9. Articles for ſale of an eſtate decreed to be ſpecially performed, *Charles v. Andrews*, 151

ESTATES-TAIL BARRED.

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1. Parol evidence admitted to prove the intention of a teſtator, *Raſhfield v. Careleſs*, 9

2. Where collateral proof ſhall be admitted to ſhew the teſtator's intent, *Raſhfield v. Careleſs*, 9, 11

3. Parol evidence ſhall not be admitted to *contradict* a will; but may be admitted to *aſcertain* a perſon or thing, 11. *notis*

4. The exemplification of a ſentence given in a foreign nation ſhall be read as evidence here, that ſuch ſentence was given there, without further proof, *Anonymous*, 66

5. Depoſitions of witneſſes who are abroad, received as evidence, ——— *v. Fitzgerald*, 330

6. In what caſes evidence allowed to be read in chancery in favour of a will, *Bailey v. Wilſon*, 473

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EXECUTORS AND ADMINISTRATORS.

1. An executor having a ſpecific legacy deviſed to him, is a truſtee for the reſiduary part, *Raſhfield v. Careleſs*, 9

2. Where an executor ſhall have the reſiduary part free from any diſtribution, *Raſhfield v. Careleſs*, 11

3. Where

3. Where an executor hath no ſpecific legacy deviſed to him, he ſhall have the *reſiduum* after debts and legacies paid, *Hutchinſon v. Vincent*, 27, 28

4. The perſonal eſtate in the hands of executors, &c. muſt come in aid of the real, *Anonymous*, 65

5. If executors pay ſpecialty debts ſecured on the real eſtate, out of the perſonal eſtate of the teſtator, the ſimple contract creditors ſhall have the ſecurities, *Charles v. Andrews*, 151

6. If a legacy be given to *B.* payable two years after the teſtator's death, and *B.* dies within the two years, yet his executors are intitled to the legacy, *Sheldon v. Sheldon*, 211

7. Joint adminiſtrators and executors muſt retain their debts rateably and in proportion to the aſſets, *Chapman v. Turner*, 268

8. A legacy to an executor, in nature of an exception, will not preclude him from the reſidue, *Newſtead v. Johnſon*, 245

EXECUTORY DEVISE.

1. If perſonalty be deviſed to a wife and ſuch child as ſhe ſhall be *enceinte* with at her huſband's death, and in caſe ſhe die without iſſue by him, a deviſe over; this is a good executory deviſe, *Evit v. Williams*, 209

2. *A.* deviſes his real eſtate to *B.* his brother for life; then to truſtees to preſerve contingent remainders; remainder for his firſt and other ſons in tail male, with power to make jointure; *and if his ſaid brother had no ſon, or if he had, and ſuch ſon died without iſſue male*, then to *C.* and his firſt and other ſons in like manner; and willed, that *his plate, jewels, &c. ſhould go to the heirs male of the family ſucceſſively, as his real eſtate is ſettled, as much as they could by law.* *B.* died having no ſon, and the limitation to *C.* held to be good by way of executory deviſe, *Gower v. Groſvenor and Piggot*, 249

EXEMPLIFICATION.

See DECREE *and* EVIDENCE.

F.

FACTOR.

Though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and receipt; and therefore if a factor pledge the goods of his principal, the principal may recover the value of them in an action of *trover* againſt the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee, *Daubigny v. Duval*, cited, 398. *notis*

FEE.

Deſcent of one diſcuſſed, *Kennedy v. Ackland*, 272

FEME-SOLE.

1. If a *feme-ſole* having 1400l. ſtock convey it to truſtees to the uſe of her intended huſband and herſelf for life, with power to diſpoſe of 200l. this power ſurvives to the wife on the death of her huſband, *Horner v. Bendlows*, 335

2. On a deviſe of ſo much money to a *feme ſole*, "provided ſhe marry with "the conſent of her father and mother, "or the ſurvivor of them;" the marriage is a *condition precedent* to the payment of the legacy, *Garbut v. Hilton*, 219

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See DEEDS, FINES, &c.

FINES.

1. Of fines levied, and uſes declared thereupon, *Trevor v. Trevor* (*See* COMMON RECOVERIES), 162, 163

2. An ejectment, and confeſſion of leaſe, entry, and ouſter, without further proceedings, is not ſuch an actual entry as will be ſufficient to avoid a fine, *Sterling v. Paulington*, 248

FORECLOSURE.

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See NOTE OF HAND.

FORM.

A court of equity will diſpenſe with the form of the inſtrument by which *an appointment* in purſuance of a power is made, *Sergiſon v. Sealy*, 390

FRAUDS.

See BARGAINS, CONVEYANCE, DEEDS, *&c.*

1. An unreaſonable marriage-ſettlement not to be ſet aſide except a fraud be proved, &c. *Hobſon v. Stanier*, 80, 81
2. An aſſignment of a leaſe of lands of 200l. value, ſet aſide as obtained by fraud, *Evans v. Hoſkins*, 83, 84
3. Where a mortgagee helps to carry on a fraud, his mortgage ſhall be ſet aſide, *Oſbourne v. Lee*, 96, 97

FUNERAL EXPENCES.

The eſtate of a huſband in the poſſeſſion of his deviſee, is liable to the funeral expences of the teſtator's wife, although ſhe lived apart from him on a ſeparate maintenance, *Bertie v. Lord Cheſterfield*, 31

G.

GIFTS.

1. Where a perſon inſiſted on an abſolute gift by the inteſtate in his life-time, when it appeared to be only a truſt, *Mitford v. Lord Herbert*, 113
2. A gift to *A.* for *life only*, *et non aliter*, and to the *heirs*, or *iſſue*, of *his body*; here *heirs* or *iſſue* are words of purchaſe; for a conſtruction ſhall not be admitted to enlarge an eſtate contrary to the word *only*, *Hodſell v. Buſſel*, 239

GUARDIANS, &c.

1. The guardianſhip of an infant is not aſſignable over to another, *Reynolds v. Lady Tenham*, 49
2. Where one was reported by a maſter to be a fit guardian to a natural child, yet ſuch guardian was not allowed, but placed with the father, who owned her, *Ord v. Blacket*, 116, 117
3. A mother cannot appoint a guardian by will, 117. *note*
4. The huſband made his wife guardian to his children, &c. but ſhe marrying again, the guardianſhip was taken from her by order of court, *Morgan v. Dillon*, 135
5. A guardian appointed by will, purſuant to the 12. Car. 2. c. 24. is within the preventive and controlling powers of chancery, 143. *note*

H.

HALF-PAY.

1. Although an officer's half-pay is not aſſignable at law, yet the uſe of it may be aſſigned in equity, and when ſo aſſigned, the aſſignor cannot maintain an *aſſumpſit* for it as money had and received to his uſe, *Stuart v. Tucker*, cited, *note* 291
2. Neither full nor half-pay of an officer aſſignable, *Stuart v. Tucker*, *ib.*
3. The king may at any time ſtop the pay of an officer in the army, by ſignifying his pleaſure that it ſhall be no longer paid, *Stuart v. Tucker*, *ib.*

HAY.

Tithes of hay ought to be paid in graſs-cocks, *Smithſon v. Dodſon*, 117

HEIR.

1. The heir favoured in equity. See page 32. 90. 122. 157. 159. 171
2. Lands were ſettled in marriage on truſtees, &c. that if the wife ſurvived, ſhe ſhould receive the profits as they were then let. The huſband made leaſes and advanced the rent; and decreed, that the heir at law ſhould have the advanced rent, *Lawley v. Lawley*, 32
3. Although

3. Although the intention of a teſtator be ever ſo apparent, the heir at law muſt of courſe inherit, unleſs the eſtate is given to ſomebody elſe, *Gaſkin v. Gaſkin*, cited, 72. *notis*

4. A will not to be eſtabliſhed againſt an heir without a trial at law, *Dawſon v. Chater*, 90

5. Lands deviſed to the wife to be ſold to pay debts, &c. not being ſold, if the perſonal eſtate will pay the debts, the heir ſhall have the whole lands, *Buggins v. Yates*, 122

6. A tenant in common dying in the life of the teſtator, his moiety will deſcend to the heir at law, *Barker v. Giles*, 157. 159

7. Lands given in truſt, or deviſed to pay debts, &c. ſhall be deemed as money in reſpect to the creditors, but not in reſpect to the heir at law, *Roper v. Radcliffe*, 171

HOLLAND.

1. If a *Dutchman* be poſſeſſed of real eſtate in *Holland*, and perſonal eſtate in *England*, and deviſe his real eſtate to *A.* and his perſonal to *B.* the perſonal eſtate ſhall be firſt applied to pay his debts in *Holland*, though real eſtate there is liable to debts, *Anonymous*, 66

2. An exemplification of a ſentence in *Holland*, under the common-ſeal of THE STATES, may be read in evidence in a ſuit in chancery, *Anonymous*, *ib.*

HUSBAND AND WIFE.

See BARON AND FEME.

I.

IDEOTS.

An information againſt one for contriving to marry a woman to an ideot, *Smart v. Taylor*, 98

JERSEY.

The laws and cuſtoms of the iſland of *Jerſey* conſidered with reſpect to the diſtribution of an inteſtate's effects, *James Pipon, &c. v. Elizabeth Pipon, &c.* 431

IMPLICATION.

See DEVISE.

INCUMBRANCES.

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INFANTS.

See GUARDIANS.

1. The guardianſhip of an infant is not aſſignable to another, *Reynolds v. Fenham*, 40

2. A contract made by an infant with conſent of his friends, is good, *Theobalds v. Duffey*, 103, 104

3. A decree for confirming or avoiding a will, where an infant is heir or deviſee, is final, *Whitechurch v. Whitechurch*, 128

4. An infant decreed to join in a conveyance within ſix months after he comes of age, *Charles v. Andrews*, 153

5. Where an infant is intitled to a perſonal eſtate and to a real one, which is incumbered, equity will direct the perſonal to go in diſcharge of the incumbrance, but will not order mortgages to be aſſigned to attend inheritances, but ſtill to remain as perſonalty, *Seys v. Price*, 221

INJUNCTION.

Huſband, poſſeſſed of a term in right of his wife, was divorced *à menſa et thoro*, and an injunction was granted, he being about to ſell this term, *Anonymous*, 43

INQUIRY.

In what caſe the Court will direct an inquiry into the perſonal eſtate of a teſtator, *Buggins v. Yates*, 123

INTENTION.

Where collateral proof ſhall be admitted to ſhew the intent of the teſtator, *Raſhfield v. Careleſs*, 9

INTEREST.

1. From what time intereſt ſhall be allowed, *Sergiſon v. Sealy*, 392

2. Money deviſed to be laid out on a ſpecial truſt carries no intereſt, *Acherley v. Vernon*, 76

3. A legacy for mourning carries intereſt, but not for a ſum uncertain; caſes cited, 79. *notis*

4. Caſes referred to wherein the court of chancery will not allow intereſt, *ib.*

JOINTENANTS AND TENANTS IN COMMON.

What words in a deviſe ſhall make a joint-tenancy, and what a tenancy in common, *Barker v. Giles*, 157, 158, 159. *notis*

JOINT EXECUTORS, &c.

See EXECUTORS.

JOINTURE.

1. An eſtate in jointure cannot ſink into a fee of a different nature, *Rogers v. Downs and Others*, 292

2. An agreement by articles to make a jointure, is equal to a jointure, according to 27. Hen. 8. c. 10. in a court of equity, *Seys v. Price*, 219

IRELAND.

Where proceſs of the chancery here, will not affect lands in *Ireland*, *Fryar v. Vernon*, 125

JUDGES CERTIFICATE.

Where a *reference* is to the Judges on a caſe ſtated, no writ of error lies on their judgment; but if they certify their reaſons, the Court may conſider of it, *Gore v. Gore*, 5

JURISDICTION.

See COURTS.

L.

LEASES.

See COVENANTS.

1. An aſſignment of an intereſt in a leaſe of lands of 200l. *per annum* value, in conſideration of 20l. only paid, and upon miſinforming the plaintiff, ſet aſide as obtained by fraud, *Evans v. Hoſkins*, 83

2. Huſband, poſſeſſed of a long term in right of his wife, made an underleaſe for ten years, and on borrowing money of the leſſee covenanted to grant him another leaſe after the end of the ten years, to continue during the time he had any right, but died before any ſuch leaſe made; yet decreed that this was a good diſpoſal of the wife's intereſt, *Steed v. Cragh*, 42

3. If tenant for life make a leaſe for years, reſerving rent at *Lady-day* and *Michaelmas*, and die inteſtate about two o'clock in the afternoon on *Michaelmas-day*, and the tenants pay the rent to the *remainder-man*, this is an admiſſion that it is due to the *inteſtate*, and the Court will order it to be paid over to the *adminiſtrator*, *Strafford v. Wentworth*, 21

4. If in a leaſe determinable on three lives it is covenanted, that on the death of one the leſſee may, if he pleaſe, ſurrender, and that the leſſor ſhall thereupon, and upon payment of a fine, grant a new leaſe for three lives in the terms of the old leaſe, and in the new leaſe the covenant to ſurrender as a life drops be made abſolute; equity will aſſiſt the leſſee to retain poſſeſſion, as if the prior leaſe had continuance, *Aſhton v. Bretland*, 59

5. *A.* ſeiſed of a church-leaſe for his own life, ſurrenders and takes a new one to him and his heirs for the lives of himſelf and of *B.* and *C.* two relations to him. *B.* paid the fine for renewal, which amounted to 1500l. and by deed-poll, dated the day after the leaſe, declared, that after his own death *B.* ſhould enjoy the eſtate for his life, and *C.* the ſon of *B.* ſhould have it after his death. *A.* continued in poſſeſſion until his

his own death; after which *B.* mortgaged, and articled for the ſale of it, and ſurrendered the old leaſe, and took a new one, and added the life of the mortgagee's ſon; and upon a bill to enforce the articles the queſtion was, Whether, as the fine was paid by *B.* and the leaſe taken in the name of *A.* it ſhould not be a reſulting truſt for *B.*? If ſo, the declaration of truſt by *A.* would be bad.—But decreed, that it was not a reſulting fine for *B.* and that he had no power to article for ſuch ſale; that if the whole conſideration for the new leaſe had moved from *B.* it would have been a reſulting truſt for him; but the new leaſe was made not only in conſideration of the fine, but of the ſurrender of the old leaſe, *Crop v. Norton*, 233

6. If a leaſe or grant is good at law, equity will not ſet it aſide without allowing for laſting improvements, *Attorney General v. Baliol College, Oxford*, 411

LEGACIES.

See DEVISES.

1. A wife is barred by a ſpecific legacy from taking the reſidue, *Martin v. Rebowe*, cited, 9. *notis*

2. Where an executor hath no *ſpecific legacy* deviſed to him, he ſhall have the *reſiduum* of the perſonal eſtate after debts and legacies paid, *Hutchinſon v. Vincent*, 27

3. How a legacy given "in lieu of *all* "*demands*" ſhall be conſtrued, *Acherley v. Vernon*, 75

4. If legacies be given *inter alia* to children "*to be paid at twenty-one, &c.*" a ſubſequent clauſe, that "*all* legacies "ſhall be paid within a year after my "deceaſe," ſhall relate only to the other legacies in the will, *Adams v. Clerke*, 154

5. On a deviſe of ſo much money to a *feme ſole*, "provided ſhe marry with "the conſent of her father and mother, "or the ſurvivor of them;" the marriage is a *condition precedent* to the payment of the legacy, *Garbut v. Hilton*, 210

6. A legacy to an executor in nature of an exception will not preclude him from the reſidue, *Newſtead v. Johnſon*, 245

7. On a bill brought for a ſpecific legacy, coſts decreed out of the other part of teſtator's perſonal eſtate, that the legacy may be entire, *Bagſhaw v. Newton*, 283

8. Where a legacy is to be paid out of lands at ſuch a time, if the legatee die before the day, the legacy is loſt; but *aliter* if out of the perſonal eſtate, *Bateman v. Roach*, 106

9. If a legacy be given to *B.* payable two years after the teſtator's death, and *B.* dies within the two years, yet his executors are intitled to the legacy, *Sheldon v. Sheldon*, 211

10. When a legacy is to be conſidered as lapſed or payable, *Wingfield v. Newton*, 428

11. What ſhall be conſidered an ademption of legacies, *Wingfield v. Newton*, 429

LETTERS.

In what caſes the court of chancery will allow letters to be read, *Montgomerie v. Attorney General*, 365

LETTERS PATENT.

See PATENT.

LIMITATIONS OF ESTATES.

See DEEDS, DEVISES, *and* EXECUTORY DEVISES.

1. See the limitations in the deeds of ſettlement of *Sir John Trevor's* eſtate, *Trevor v. Trevor*, 161, 162, *&c.*

2. A term on truſt for a life; then to *the heirs of the body* of *A.* begotten, or to be begotten by *B.* her huſband, and to their *executors*, adminiſtrators and aſſigns, and for want of ſuch iſſue, then over to *C.*; this is a good limitation over to *C. Hodſell v. Buſſell*; 236

3. The words *heirs of the body*, or *iſſue*, though ſtrictly words of limitation, yet may be words of purchaſe, *Hodſell v. Buſſell*, 237

LIMITATIONS, THE STATUTE OF.

See STATUTE 21. JAC. 1. c. 16.

LONDON.

See CUSTOMS OF LONDON.

1. A freeman of *London* having one daughter, and ſeveral grand-children by her, deviſed his perſonal eſtate to pay debts and legacies, and afterwards what remained to be ſold, and the money ariſing by ſale, *viz.* the intereſt, to be paid to his grand-children, ſhare and ſhare alike, until of age, but did not diſpoſe of the principal ſum; and his daughter, who was heir at law, and her huſband, exhibit a bill to have the principal, *Newland v. Shepherd*, 58

2. Caſe upon the will of *Mr. Alderman Parſons*, touching the diſtribution of his eſtate as a freeman of *London*, *Parſons v. Parſons*, 464

LUNATIC.

If the truſtee of a lunatic renew a leaſe for his own benefit, it is a breach of the truſt, *Ex parte Phelps*, 357

M.

MARRIAGE AND MARRIAGE SETTLEMENT.

See AGREEMENTS, BARON AND FEME, *and* LIMITATIONS.

1. A father agreed to give his daughter 3000l. as a marriage portion with the plaintiff, and, having deviſed 2000l. to her, died before the marriage. It was decreed, that the huſband ſhall not have the other 1000l. becauſe he knew that 2000l. was deviſed to her, and having accepted that legacy in marriage, ſhall have no more, *Ayliffe v. Tracy*, 3

2. If a mortgagee fraudulently antedate the mortgage-deed, for the purpoſe of over-reaching a marriage-ſettlement, the mortgage is void, *Oſborn v. Lea*, 96

3. The wife being poſſeſſed of a term for years, and having married an alien, the marriage is not a gift in law to him of that term, *Theobalds v. Duffey*, 104

4. If a huſband make a ſettlement on his wife, in conſideration of a marriage portion, the wife ſhall be endowed, if it be not expreſsly ſtated in the deed to be "in bar of her dower," *Charles v. Andrews*, 152

5. On a deviſe of ſo much money to a *feme ſole*, "provided ſhe marry with "the conſent of her father and mother, "or the ſurvivor of them;" the marriage is a condition precedent to the payment of the legacy, *Garbut v. Hilton*, 210

6. *A.* by will, gives to his daughter 1000l. to be paid at twenty-one, or marriage, provided ſhe marry with conſent of executors; if any of the executors die, condition void, *Graydon v. Hickes*, 215

7. But if a legacy be given to *A.* with condition, that if ſhe ſhall marry before twenty-one without the conſent of the executor, then to *B.* &c. *C.* the executor renouncing, yet this conſent neceſſary to ſave the condition, *Graydon v. Hickes*, 216

8. A *choſe in action* of the wife's before marriage, and charged upon the huſband's eſtate, ſhall not, after the death of the huſband, ſurvive, but ſhall be conſidered as merged, *Seys v. Price*, 220

9. Information againſt a perſon for contriving the marriage of an ideot, *Smart v. Taylor*, 98

10. A foreigner who marries a ſubject of *England* attainted of treaſon, ſhall forfeit her portion to the king, *Drummond v. Decker*, 100

11. By marriage articles the eldeſt ſon was made tenant in tail; *proviſo*, that the father might ſell the lands by conſent of the truſtees, and purchaſe other lands, and ſettle them to the like uſes; he purchaſed other lands, but did not ſettle to like uſes, yet good, *Reeves v. Reeves*, 128

12. Lands were ſettled in marriage on truſtees, &c. that if the wife ſurvived, ſhe

ſhe ſhould receive the profits as they were then let; the huſband made leaſes and advanced the rent: decreed, the heir ſhall have the advanced rent, *Lawley v. Lawley*, 32, 33

13. An unreaſonable marriage-ſettlement ſhall not be ſet aſide, there being no fraud proved, or incapacity in the huſband, *Hobſon v. Stanner*, 80

14. See the articles on *Sir John Trevor's* marriage decreed, *Trevor v. Trevor*, 161, 162, &c.

MINOR.

See REVERSION.

MORTGAGES, MORTGAGOR, &c.

See DEVISE, FRAUD.

1. A mortgagee cannot make a leaſe of a houſe in mortgage before a foreclo-ſure, nor preſent on an avoidance, *Hungerford v. Clay*, 1

2. Equity will not interpoſe on a cove-nant that a mortgagee ſhall have the benefit of pre-emption, if it be not in-ſiſted on until after the eſtate is ſold, *Orby v. Trigg*, 2

3. The ſubſequent mortgagee prays to redeem the firſt mortgage on payment of what was due, and pending that ſuit the firſt mortgagee ſets up another mortgage prior to them all; and a trial at law was decreed, whether that mort-gage was executed; and if it was, how much money was due on it, *Dowſe v. Rue*, 38, 39

4. *A.* mortgages his freehold and copy-hold eſtates, and ſurrenders the copy-hold to the mortgagee; afterwards he makes his will, and deviſes his *manors, meſſuages, farms, lands, tenements and hereditaments*, in truſt to pay debts, and after to *C.* for life, remainder to *D.* in fee, and dies. The Lord Chancellor, on bill brought by the creditors and *C.* and *D.* ſeemed to think, that as the copyhold was not named in this deviſe, in caſe there ſhould be any ſurplus after debts paid, it would go to the heir at law; but reſerved this point, *Gibſon v. Stiles*, 267

5. Redemption of mortgages ſubject to ſtatute of Limitations for making en-tries and bringing ejectments; but where mortgagee enters and holds until the mortgage is ſatisfied, as in *Welch* mortgages, there no time bars the mortgagor's redemption, *Lockwood and Others v. Ewer and Others*, 276

6. *A.* on an account ſtated, owes *B.* 400l. *A.* agrees to give bond for 100l. and to ſecure the remaining 300l. by mort-gage. *A.* delivers a deed of convey-ance to *C.* an attorney, who takes in-ſtructions to draw mortgage; but before the bond or mortgage executed *A.* dies. Though this agreement by parol be proved, yet on a bill brought againſt the heir of *A.* the Court refuſed to carry them into execution, *Brixick v. Manners*, 283

7. If a mortgagee take advantage of the neceſſities of a mortgagor, and thereby increaſe the rate of intereſt on the money lent, and obtain the grant of a ſtewardſhip, a court of equity will af-ford relief, *Thornhill v. Evans*, 330

8. Mortgage without notice, equity will not ſuffer it to be diſturbed, but will oblige a judgment creditor to redeem it, *Elwys v. Sir John Thompſon*, 393

9. If a man borrow money and make a mortgage, with a perſonal covenant for the payment of the money, and alſo give a bond at the ſame time, there being in this caſe borrowing and lend-ing, that which is the moſt natural fund for payment of debts ſhall be firſt applied, which is the perſonal eſtate, and the mortgage is no more than a ſecurity, *La Ney v. The Dutcheſs of Athol*, 398

10. If a perſon, indebted by mortgage and bond, pay money to his creditor generally, the creditor may apply it in diſcharge either of the mortgage or bond, *Wilkinſon v. Sterne*, 427

11. On a tender to redeem a mortgage, the mortgagee is intitled to have a rea-ſonable time to peruſe the aſſignment, *Wilſhaw v. Smith*, 441

12. In what caſe real and perſonal aſſets ſhall be liable to mortgagee, *Lloyd v. Thurſby*, 463

13. If

13. If a mortgagee fraudulently antedate the mortgage deed, for the purpose of over-reaching a marriage settlement, the mortgage is void; but the fact of fraud must be previously tried at law, *Osborn v. Lea*, 96

14. A mortgagee need not give notice of his mortgage to the purchaser of the estate, *Osborn v. Lea*, 97

15. Bill against a mortgagee, to compel him to reconvey upon payment of principal and interest, *Cox v. Coffin*, 120

16. The mortgagee had a term for five hundred years, and afterwards took another term of the same lands for one thousand years, in the name of a third person, to commence after the determination of the first term, in trust for himself; and afterwards he purchased the fee-simple in his own name; and then he devised the said lands to *E. G.* for life, remainder in tail, &c. This will was void so as to pass the lands, because not attested by three witnesses; but it was insisted that it was good to pass the term of one thousand years as a term in gross, and separated from the inheritance; but decreed, that it was a term which attended the inheritance by implication of law; for it is not expressly devised for that purpose, and there is no apparent intention that the testator designed to pass it as a separate interest, *Whitechurch v. Whitechurch*, 124

17. The Court will open the foreclosure if there be any unfair conduct in the mortgagee, *Soley v. Salisbury*, 153

18. *A.* gives *B.* a mortgage to receive the money due upon it. *B.* pawns it, and *A.* brings his bill: and held a proper remedy; though urged, that an action of trover would lie, as in the case of plate pawned by a servant, *Jackson v. Butler*, 297

MORTMAIN.

See CHARITIES.

1. *A.* devised his real and personal estate to *St. Bartholomew's Hospital*; and it being doubted whether this devise was within the statute of Mortmain, the governors of the hospital and next of kin came to an agreement, that one-fourth should be paid to the next of kin, the other three-fourths to the hospital, which agreement was carried into execution, *Attorney-General v. Landerfield*, 286

2. It was said at the making of this statute, that it would not hinder any charitable distribution of personal estate, 233

N.

NEWSPAPER.

A share in a newspaper shall be considered as the personal property of the proprietor, and the profits of printing the same, subsequent to his death, be distributed accordingly, *Gibblett v. Read*, 459

NEW TRIAL.

1. The Court will not grant a new trial, upon a suggestion that the party was not apprised of a particular evidence, *Richards v. Sims*, 328

2. The court of chancery will not grant a new trial after two trials at bar, although the verdicts were contrary to each other; unless such new trial appears necessary to the justice of the case, from *new evidence*, which could not be had on the former trials, *Montgomery v. Attorney-General*, 388

NON-REPAIR.

If a lessor recover possession at law, on a breach of covenant for non-repair, equity will relieve the lessee on his paying the damages occasioned by not repairing, although the lease was conditioned to be void on non-performance of the covenants, *Hack v. Leonard*, 91

NOTE OF HAND.

1. A defendant is obliged to deliver up a note, though forged, *Jackson v. Butler and Spring*, 297

2. A gold-

2. A goldſmith's note was given in part of payment of money on a *Saturday*, and not offered to the drawer until the *Monday* following; this is no new credit given to the drawer, but the indorſor is ſtill liable, *Mead v. Caſwell*, 60

O.

OATH.

See AFFIDAVIT.

P.

PAPISTS.

1. Where papiſts are not diſabled by the ſtatute 11. & 12. Will. 3. to bring their bill in equity, *Carrick v. Errington*, 33, 34
2. Whether a monk profeſſed is capable of taking an eſtate, *Sir L. Anderton's Caſe*, 55, 56
3. Deviſe of a term in truſt for a papiſt, void, *Winter v. Birmingham*, 146, 147
4. A bill by a proteſtant heir to recover lands deviſed by a papiſt in truſt, *Hill v. Filkins*, 154, 155
5. Deviſe of lands to a papiſt is a purchaſe within the ſtatute 11. & 12. Will. 3. c. 4. *Ratcliffe v. Roper*, 167
6. But where a papiſt being tenant in tail, ſuffers a common recovery, and declares the uſes to himſelf and his heirs, this is no purchaſe within that ſtatute, *Lord Derwentwater's Caſe*, 172, 173
7. If *A.* by bond, bind himſelf, his heirs, executors and adminiſtrators to a papiſt, who obtains judgment, and takes out an *elegit*, ſuch papiſt cannot maintain ejectment, yet the bond binds the repreſentatives of the obligor, *Sorreſby v. Hollins*, 223

PAROL.

See AGREEMENT.

PARTIES.

No need to make people parties to a bill who live out of the proceſs of the court; and a decree will not be void againſt ſuch perſons, though they are not made parties; but it is uſual, in ſuch caſes, to reſerve liberty to reply for farther directions, that perſons out of the proceſs of the court may not be quite concluded, but may have liberty to apply for alterations in the decree by petition, *Attorney-General v. Baliol College, Oxford*, 409

PATENTS.

The king's letters patents vacated, becauſe obtained by a groſs impoſition on the king, *Vernon v. Benſon*, 48

PAWNS.

See PLEDGES.

PAYMENT.

See DEBTS.

PENALTY.

See BOND.

PERSONALTY.

1. If perſonalty be deviſed to a wife and ſuch child as ſhe ſhall be *enceinte* with at her huſband's death, and in caſe ſhe die without iſſue by him, upon her death a deviſe over; this is a good executory deviſe, *Evit v. Williams*, 209
2. Where an infant is entitled to a perſonal eſtate, and to a real one which is encumbered, equity will direct the perſonal to go in diſcharge of incumbrances, but will not order mortgages to be aſſigned to attend inheritances, but ſtill to remain as perſonalty, *Seys v. Price*, 221
3. Perſonalty limited to *H.* for life, then to his firſt ſon in tail; if he has none ſuch, remainder over good, *Gower v. Groſvenor and Piggot*, 252
4. In caſe of perſonalty, no occaſion to foreclose, *Lockwood and Others, v. Ewer and Others*, 278

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See DEFENDANT.

PLEAS.

1. The ſtatute of Limitations is no good plea where the eſtate in law is in truſtees, *Carrick v. Errington*, 33

2. See a decree in the exchequer pleaded, but over-ruled, *Wing v. Wing*, 109, 110

PLEDGES.

See FACTOR.

1. On pledges of perſonal things, if the pledger does not redeem them at the day, the pawnee may ſell them without a decree to foreclose, *Lockwood and Others v. Ewer and Others*, 278

2. *A.* gives *B.* a mortgage to receive the money due upon it. *B.* pawns it, and *A.* brings his bill: and held a proper remedy; though urged that an action of trover would lie, as in the caſe of plate pawned by a ſervant, *Jackſon v. Butler and Spring*, 297

PORTIONS AND PROVISIONS FOR CHILDREN.

See MARRIAGE-SETTLEMENTS, *and page* 161, 162, *&c.*

1. In what caſes daughters' portions may be raiſed, *Hall v. Carter*, 347

2. When raiſable by ſale of a reverſionary term, *Adams v. Danvers*, 486

POSSESSION.

If a perſon be twenty-ſeven years in poſſeſſion of a leaſe, it ſhall not be taken to have been held in truſt, although he declare it to have been ſo by his will, *Winter v. Birmingham*, 145

POSSIBILITY.

A poſſibility of a term is in equity aſſignable for a good conſideration, *Theobalds v. Duffey*, 102

POWER.

1. A power to act according to diſcretion, 11

2. Defective powers made good, *Coventry v. Coventry*, 12, 13

3. See caſes cited, 20 *in notis*, and *Harvey v. Harvey*, 253. 255

4. A court of equity will not ſupply a deficiency in the circumſtances required to attend the execution of a power, if it is not executed on a valuable conſideration, *Sergiſon v. Sealy*, 392

5. The definitive execution of a power, *Wilkes v. Holmes*, 485

PRÆMIUM PUDICITIÆ.

A. (for many years a common whore) was kept by *B.* for ſome time, and then married *C.*; *B.* continued his viſits to her, and gave her a note for 1000l. payable on demand. *B.* died, and now upon a bill brought by his adminiſtratrix, this note was ſet aſide, it being entered into *ex turpi cauſâ*, and not as *præmium pudicitiæ*, *Robinſon v. Cox*, 263

PROCESS.

Where proceſs of this court will not affect lands in *Ireland*, ſo as to ſequeſter them for a contempt, *Fryar v. Vernon*, 124

PRO CONFESSO.

Defendant brought from the *Fleet* upon an *alias pluries habeas corpus*, for his contempt in not putting in his anſwer; and it was now moved, that the bill might be taken *pro confeſſo*; and ſo ordered, *Allan v. Parkinſon*, 266

PROOF.

See EVIDENCE.

PROXIMITY OF BLOOD.

See BLOOD.

PURCHASE, *&c.*

1. Who is a purchaſer, and what a purchaſe, *Lord Derwentwater's Caſe*, 172. 175, 176, 177

2. Where a perſon, knowing his own title, does not give notice of it to a

purchaſer, he ſhall never ſet it up againſt the purchaſe, *Savage v. Foſter*, 35

3. If a father, previous to his being found a lunatic, make a purchaſe of an eſtate with the conſent and approbation of his only ſon, the purchaſe is good, and the money laid out therein ſhall not be conſidered as perſonal eſtate, *Sergiſon v. Sealy*, 370

4. The words *heirs of the body* or *iſſue*, though ſtrictly words of limitation, yet may be words of purchaſe, *Hodſell v. Buſſell*, 237

Q.

QUAKER.

Chancery will not grant a *ſupplicavit* on the affirmation of a quaker, *Ex parte Gumbleton*, 232

R.

RECOVERY.

See COMMON RECOVERY.

REFERENCES.

See JUDGES.

RELIEF IN CHANCERY.

See DEVISE, LEGACY, *&c.*

1. See relief granted after a decree ſigned, enrolled and exemplified, *Mayor of Coventry v. Craven*, 6

2. Defective powers relieved in equity, *Coventry v. Coventry*, 12

3. Bill in chancery will not lie to be relieved againſt a wilful voluntary breach of covenant or condition, *Deſcarlet v. Dennett*, 22

4. Chancery will not relieve againſt a covenant, where, on the performance or non-performance of the act to be done or omitted, the party is to pay a ſum by way of *liquidated damages*, Caſes cited, 22 *in notis*.

5. But the Court will relieve where the penalty is intended merely to ſecure the enjoyment of a collateral object, *ib.*

6. An agreement in writing loſt, but confeſſed by anſwer, made good, *Hoſier v. Read*, 86

7. Relief granted againſt a covenant in a leaſe, it not being drawn purſuant to the covenants in an old leaſe, *Aſton v. Bretland*, 58, 59

8. *Quære*, If relief may be againſt a verdict in ejectment, 90, 91

Caſes denied relief.

9. A hard award not relieved, though made without the knowledge of one of the parties, *Waller v. King*, 63, 64

10. Where a legacy is to be paid out of lands at a time certain, if the legatee dies before, *Bateman v. Roach*, 106

11. An unreaſonable marriage-ſettlement denied relief, *Hobſon v. Staneer*, 80

12. Leſſee for years covenants not to alien without licence, under penalty of forfeiting his leaſe; if he break his covenant, equity will not relieve him, *Waſer v. Mocato*, 112, 113

13. Extravagant bargains not to be carried into execution in equity, *Charke v. Andrews*, 152, 155

REMAINDERS.

See DEEDS, LIMITATIONS, *and* MARRIAGE-SETTLEMENTS.

RENT.

The leſſor died on the very day the rent was payable, and held not to be due till the laſt minute of that day, *Stafford v. Wentworth*, 21

REPLEVIN.

1. Replevins may be removed out of inferior into ſuperior courts; in the county-court, which is not a court of record, by *pone* or *recordari*; but not by

by the defendant without cauſe, *Woodcroft v. Kynaſton*, 305

2. In the hundred court, or court of any private lord, not of record, by *accedat ad curiam*; but not either by plaintiff or defendant without cauſe, *Woodcroft v. Kynaſton*, 306

3. There is no method of removing proceedings out of courts of record but by *certiorari* before judgment, or writ of error after, *Woodcroft v. Kynaſton*, *ib.*

4. *Certiorari* muſt be to remove the record itſelf, where the action commenced in the inferior court is to be proceeded upon. But where an action in the inferior court is brought on a judgment in a ſuperior, and *nul tiel record* pleaded, a *certiorari* to remove the tenor of the record is ſufficient, *Woodcroft v. Kynaſton*, 307

RESIDUUM.

See BLOOD, EXECUTOR.

REVERSION.

If *A.* buy from *B.* a minor, under circumſtances of diſtreſs, the reverſion of a houſe worth forty pounds a-year, for one hundred pounds, and ſell it again in a few days for two hundred pounds, equity will compel *A.* to account with *B.* for the difference, *Spencer v. Chaſe*, 29

REVOCATION.

See WILLS.

S.

SEQUESTRATION.

See PROCESS.

SETTLEMENT.

1. A father makes a voluntary ſettlement on his family without power of revocation inſerted, and afterwards makes a contrary diſpoſition by will, this will not affect the former ſettlement, *Boughton v. Boughton*, 212

2. If a huſband make a ſettlement on his wife in conſideration of a marriage portion, the wife ſhall be endowed, if it be not expreſsly ſtated in the deed to be "in bar of dower," *Charles v. Andrews*, 152

3. *A.* deviſes his lands to truſtees for payment of debts and legacies, and after to *B.* in tail male; *B.* ſuffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and alſo of a bond for 200l. charged on the ſaid eſtate; on which *B.* covenants with truſtees, by articles, in conſideration of intended marriage, and of the portion of 3000l. and bond of 200l. to ſettle a jointure upon *C.* of one-third of the deviſed eſtate, which was about 300l. *per annum*, in bar of dower. The marriage took effect, and the wife ſurvived, yet her *choſes in action* being the conſideration of the ſettlement, ſhall not ſurvive in equity. And this a good ſettlement, according to 27. Hen. 8. cap. 10. to bar the wife of her dower. But if, in conſideration of the wife's fortune, which conſiſted of *choſes in action*, a huſband ſettles an eſtate inadequate to ſuch fortune and the degree of the wife, a court of equity will not take away that right which the law gives the wife to *choſes in action*, *Seys v. Price*, 217

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SIGN MANUAL.

A ſign manual not counterſigned by the lords of the treaſury, or a ſecretary of ſtate, is not good, *Vernon v. Benſon*, 47, 48

SPECIAL ORIGINAL.

In what caſes the court of chancery will permit a new ſpecial original to be filed after a judgment by default, *Dillon v. Green*, 442

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Equivalent to the ſealing of a teſtamentary paper, *Sprange v. Barnard*, cited, 13

STATUTES.

STATUTES.

I. THE STATUTE 9. Hen. 3. c. 32.

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II. THE STATUTE Weſtm. 2. c. 1. 13. Edw. 1.

De Donis.

1. What truſts within and what not within that ſtatute, *Webber v. Montrath*, 144, 145

2. Cited, 175. 205

III. THE STATUTE 18. Edw. 1.

Quia Emptores,

Makes it lawful for every freeman to ſell, &c. *Roper v. Radcliffe*, 204

IV. THE STATUTE 45. Edw. 3. c. 16.

Referred to, 151

V. THE STATUTE 15. Rich. 2. c. 5.

Statute of Mortmain.

1. Lands purchaſed by people of religion to be forfeited, and thereafter no purchaſe to be made to the uſe of ſpiritual perſons, *Lord Derwentwater's Caſe*, 177

2. This law extended to mayors, &c. of cities and boroughs, and other towns which have a perpetual commonalty, *Roper v. Radcliffe*, 202

3. But, ſpeaking of lay communities, it forbids only purchaſors generally, *Roper v. Radcliffe*, 204

4. Cited, 221, 222, 223. 286

VI. THE STATUTE 4. and 5. Edw. 6. c. 8.

By this act, "the father of any maid or "woman-child unmarried, and within "the age of ſixteen, might by his laſt "will and teſtament, or by any other "act in his life time, appoint, aſſign, "bequeath, give, or grant, the order, "keeping, education, or government, "of ſuch maid or woman-child, but "not of the males," 139

VII. THE STATUTE 5. and 6. Edw. 6. c. 16.

Sale of Offices.

Cited, 425

VIII. THE STATUTE 21. Hen. 8. c. 15.

By this act, "a termor might falſify ſuch "recovery, as any tenant of the free-"hold might do by the courſe of com-"mon law, when he was neither privy "nor party to the ſame; and that "notwithſtanding any ſuch recovery, "he ſhould hold and enjoy his term, "according to his leaſe, againſt the "recoveror, his heirs and aſſigns," 163

IX. THE STATUTE 27. Hen. 8. c. 10.

Statute of Uſes.

1. Cited, 18

2. A uſe before this ſtatute was a mere truſt, cognizable only in equity, *Roper v. Radcliffe*, 186

3. Cited, 218, 219

X. THE STATUTE 32. Hen. 8. c. 1.

Statute of Wills.

Cited, 78. 139, 140

XI. THE STATUTE 13. Eliz. c. 18.

All leaſes by bodies corporate, for a longer term than twenty-one years or three lives, ſhall be void, *Furnivall v. Crew*, 458

XII. THE STATUTE 14. Eliz. c. 11.

Cities and Market Towns.

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XIII. THE STATUTE 27. Eliz. c. 4.

Fraudulent Conveyances.

1. Its force and effects, 202, 205

2. Cited, 321

XIV. THE STATUTE 43. Eliz. c. 4.

Cited, 65

XV. THE STATUTE 21. Jac. 1. c. 16.

Statute of Limitations.

No good plea, where the eſtate in law is in truſtees, *Lawly v. Lawly*, 33

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XVI. THE STATUTE 21. Jac. 1. c. 19. *Bankrupts.*

No purchaſor for valuable conſideration ſhall be impeached, unleſs the commiſſion be ſued out within five years, *Roper v. Radcliffe*, 202

XVII. THE STATUTE 12. Car. 2. c. 24. *Guardians to Infants.*

1. Cited, 136
2. Gives the father a power, either by deed or will, to appoint a guardian, 140
3. But a guardian ſo appointed is within the preventive and controlling power of the court of chancery, 143. *notis*

XVIII. THE STATUTE 22. and 23. Car. 2. c. 10. *Statute of Diſtributions.*

Cited, 432. 468

XIX. THE STATUTE 29. Car. 2. c. 3. ſ. 7. *Statute of Frauds and Perjuries.*

1. By this act, "All declarations or "creations of truſts or conſidences of "any lands, tenements, or hereditaments, ſhall be manifeſted and proved "by ſome writing ſigned by the party "who is by law enabled to declare "ſuch truſt, or by his laſt will in writing, or elſe they ſhall be utterly void "and of none effect. And where any "conveyance ſhall be made of any "lands or tenements by which a truſt "or confidence ſhall or may ariſe or "reſult by the implication or conſtruction of law, or be transferred or extinguiſhed by an act or operation of "law, then ſuch truſt or confidence "ſhall be of the like force and effect "as the ſame would have been if this "ſtatute had not been made," 73
2. The ſame act cited, 88
3. The fifteenth ſection of this ſtatute declares, that judgments as againſt purchaſors *bona fide* for valuable conſiderations, of lands to be charged thereby, ſhall, in judgment of law, be judgments only from the ſigning; and the eighteenth ſection declares, that no recognizance ſhall bind any land, &c. in behalf of any purchaſor *bona fide* and for valuable conſideration, but from the time of the inrolment, *Roper v. Radcliffe*, 202, 203

XX. THE STATUTE 30. Car. 2. The declaration in that act to be taken by papiſts, 155

XXI. THE STATUTE 7. and 8. Will. 3. c. 27. Cited, *Vernon v. Benſon*, 54

XXII. THE STATUTE 11. and 12. Will. 3. c. 4. *Papiſts.*

1. Where papiſts are not diſabled by this ſtatute to bring their bill in equity, *Carrick v. Errington*, 33
2. The fifth and ſixth ſections of this ſtatute cited, *Hill v. Filkins*, 155
3. Deviſe of lands to a papiſt is a purchaſe within the meaning of this act, *Roper v. Radcliffe*, 167
4. A papiſt being tenant in tail ſuffered a common recovery, and declared the uſes to himſelf and his heirs; this is not a purchaſe within this ſtatute; for it is no new acquiſition, but a modification of the family eſtate, *Lord Derwentwater's Caſe*, 172
5. What intereſts are within this ſtatute, *Roper v. Radcliffe*, 181
6. Whether a gift by will be within the act or not, *Roper v. Radcliffe*, 200

XXIII. THE STATUTE 12. and 13. Will. 3. c. 10. ſ. 89, 90.

1. No member of the houſe of commons ſhall be capable of holding any office or employment in the cuſtoms, *Salwyn v. Honeywood*, 422
2. Cited, 425, 426, 427.

XXIV. THE STATUTE 4. and 5. Ann. c. 16. ſ. 12. *Amendment of the Law.*

Money paid after the day may be pleaded in bar as well as at the day, provided it

it was paid before the action brought, *Winchester's Case*, 471

XXV. THE STATUTE 11. and 12. Ann. c. 9.

Annuity Tickets.

A purchaser of a ticket under this act, who neglects to comply with its directions, cannot, on his losing such ticket, be relieved in EQUITY against a *bona fide* holder of it who has complied with the directions of the act, *Devallar v. Herring*, 45

XXVI. THE STATUTE 1. Geo. 1. c. 56.

Pension Act.

1. Members of the house of commons incapacitated from enjoying pensions from the crown, *Selwyn v. Honeywood*, 422

2. Cited, 425

XXVII. THE STATUTE 5. Geo. 1.

Bankrupts Certificates.

Bankrupts only discharged by their certificates from debts due and owing at the time of the bankruptcy, *Winchester's Case*, 473

XXVIII. THE STATUTE 7. Geo. 1.

Bankrupts.

Cited, 473

XXIX. THE STATUTE 9. Geo. 1. c. 7. s. 5.

Settlement.

Cited, 172. *notis*

XXX. THE STATUTE 11. Geo. 1. c. 18. s. 17.

Freemen of London.

1. By this act, "a freeman of the city of "*London* may give, devise, will, and "dispose of, his personal estate to such "person and to such use as he shall "think fit, any custom or usage of or "in the said city, or any by-law or "ordinance made or observed within "the same, to the contrary notwithstanding: PROVIDED NEVERTHELESS, he may agree, by any writing "under his hand, upon or in consideration of his marriage, or otherwise, "that his personal estate shall be subject to, or be distributed according "to, the custom: AND IF such freeman shall die intestate, the personal "estate of such person so making such "agreement, or so dying intestate, "shall be subject to, or distributable "according to, the custom of the city, 58. *in notis.*

2. Same act cited, 93

XXXI. THE STATUTE 4. Geo. 2. c. 5.

Cited, 429

XXXII. THE STATUTE 4. Geo. 2. c. 28.

Cited, 22

XXXIII. THE STATUTE 6. Geo. 2.

Cited, 269

XXXIV. THE STATUTE 7. Geo. 2.

Cited, 471

XXXV. THE STATUTE 9. Geo. 2. c. 36.

Cited, 65

XXXVI. THE STATUTE 11. Geo. 2. c. 19.

1. "Where any tenant for life shall happen to die before or on the day on "which any rent was reserved or made "payable upon any demise or lease of "any lands, tenements, or hereditaments, which determined on the "death of such tenant for life, the "executors or administrators of such "tenant for life shall recover, in an "action on the case, of and from such "undertenant or undertenants of such "lands, tenements, or hereditaments; "if such tenant for life die on the day "on which the same was made payable, the whole, or if before such day, "then a proportion of such rent, according to the time such tenant for "life lived of the last year, or quarter "of a year, or other time in which the "said rent was growing due as aforesaid, &c." 22

2. If

4. If tenant in tail make a leaſe, and die without iſſue before the rent becomes due, the rent in arrear at the time of his death ſhall be apportioned between the perſonal repreſentative of the tenant in tail and the remainder-man in fee, *Pagget v. Gee*, 482

STOCK.

If a perſon has 1800l. ſtock in the funds, and deviſes 1000l. of it, and afterwards ſells 1600l. and then buys 1400l.; and between the making of the will and the teſtator's death the Legiſlature changes that kind of ſtock into annuities, theſe circumſtances make no alteration in the legacy, *Partridge v. Partridge*, 269

SUPPLICAVIT.

Chancery will not ſupply a *ſupplicavit* on the affirmation of a quaker, *Ex parte Gumbleton*, 232

T.

TAIL.

1. If tenant in tail make a leaſe, and die without iſſue before the rent becomes due, the rent in arrear at the time of his death ſhall be apportioned between the perſonal repreſentative of the tenant in tail and the remainder-man in fee, *Pagget v. Gee*, 482

2. A copyhold eſtate limited to *a woman* in tail may be conveyed to the huſband in fee by a bargain and ſale to lead the uſes of a common recovery, although, by the cuſtom of the manor, it was not capable of being entailed, *Pullen v. Lord Middleton*, 483

TENANTS IN COMMON.

See JOINTENANTS.

TENANT BY CURTESY.

See CURTESY, &c.

TENANT FOR YEARS.

See ESTATES.

TITLE.

Where a perſon knowing his own title, and not giving notice of it to a purchaſor, ſhall never ſet it up againſt the purchaſor, *Savage v. Foſter*, 35

TREASON.

Whether a foreigner who married a ſubject of *England* attainted of treaſon ſhall forfeit her portion to the king, *Drummond v. Decker*, 100

TREASURY.

See SIGN MANUAL.

TRESPASS.

In an indictment for treſpaſs in which was no violence, but brought to try a civil right, which is the ſubject of an action, proſecutor ordered not to proceed until the hearing of the cauſe or further order, *Lord Mayor, &c. of York v. Sir Lionel Pilkington and Others*, 273

TRIAL AT LAW.

In what caſes a court of equity will direct the point in diſpute to be tried at law, *Patterſon v. Taſt*, 397

TROVER.

In trover for an annuity-ticket, the plaintiff was nonſuit, *Devallar v. Herring*, 44, 45

TRUSTS

1. Are to be declared in writing ſigned by the party, by the ſtatute of 29. *Car.* 2. *Atcherley v. Vernon*, 72, 73

2. For deviſes of lands, &c. in truſt, *ſee tit.* DEVISE, and 29. 122

3. Where one inſiſted on an abſolute gift, but it appeared to be in truſt, *Mitford v. Herbert and Others*, 113, 114

4. Where the heir ſhall have the land as a reſulting truſt, notwithſtanding a deviſe, *Buggins v. Yates*, 122, 123

5. Where

5. Where lands given in truſt ſhall be deemed as money or not, *Roper v. Radcliffe*, 171

6. If the truſtee of a lunatic renew a leaſe for his own benefit, it is a breach of the truſt, *Ex parte Phelps*, 357

7. A truſt declaring the benefit of a term to *ceſtui que truſt*, if ſhe *ſhould ſo long live*, is of the ſame import as if it had been given to her for her life only, *Hodſell v. Buſſell*, 239

8. Bill againſt the truſtees of *Mr. Snell's* charity, praying an account of the funds, &c. 407

9. Of deviſes in truſt for papiſts, &c. *ſee* PAPIST.

TURPI CAUSA.

See PRÆMIUM PUDICITIÆ.

If a bill to ſet aſide an annuity *pro turpi cauſâ* charge generally that the annuitant was a lewd and infamous woman, the plaintiff may examine to particular acts of lewdneſs and infamy, *Clark v. Peryam*, 340

TITHES.

Tithes of hay ought to be paid in graſs-cocks, *Smithſon v. Dodſon*, 117, 118

2. A bill brought by a perſon as *lay-impropriator* of tithes, for an account of tithes, diſmiſſed, *Ward v. Henzel*, 311

3. Potatoes are only ſmall tithes, in whatever quantities they may be ſown, *Smith v. Wyatt*, 336

U. V.

VERDICT.

See relief after a verdict, *Hack v. Leonard*, 90, 91

USES.

1. Of deviſes and ſettlements to uſes, *ſee page* 4, 5. 162. *and tit.* DEVISE and MARRIAGE-SETTLEMENTS.

2. Of declaring uſes on a fine or common recovery, *Lord Derwentwater's Caſe*, 176, 177, &c.

UNDERTAKING.

If *A.* a general merchant, undertake voluntarily and without reward to enter a parcel of goods for *B.* together with a parcel of the ſame ſort, at the *Cuſtom-houſe* for exportation, but makes the entry under a wrong denomination, whereby both parcels are ſeized; *A.* having taken the ſame care of the goods of *B.* as of his own, not having received any reward, and not being of a profeſſion or employment which neceſſarily implied ſkill in what he had undertaken, is not liable to an action for the loſs occaſioned to *B. Shields v. Blackburn*, cited, 356. *notis*

W.

WASTE.

A decree in the exchequer for reſtraining waſte pleaded, &c. *Wing v. Wing*, 109, 110

WILLS.

See DEVISES.

1. Making a ſecond will is a revocation of the firſt; and after the probate of the firſt was confirmed by the delegates, a commiſſion of review was granted, *Anneſley v. Palmer*, 7, 8

2. If a teſtator deviſe "all the reſt and "reſidue of his real and perſonal eſtate "to *A. B. C.* and *D.* in truſt," and afterwards make a codicil whereby he "ratifies and confirms his will, except "in the alterations aftermentioned;" and then revokes that part of his will whereby he appointed *A.* and *B.* his truſtees, and requeſts *E.* and *F.* to be two of his truſtees, and deviſes his real eſtate to them accordingly; this is only a revocation as to the appointment of the two truſtees, and not of any other part of the will, *Acherley v. Vernon*, 68

3. A will not to be eſtabliſhed againſt an heir at law without a trial at law, *Dawſon v. Chattr*, 90

4. If a teſtator deviſe lands in truſt for his nephew *A.* and for his niece *B.* and the children of the ſaid *B.* by her huſband, to receive the profits when they come of age, and alſo bequeath money for the uſe of the ſaid children at their reſpective ages of twenty one, and afterwards make a codicil confirming thoſe bequeſts; all the children of *B.* not only thoſe ſhe had at the time the will was made, but thoſe ſhe may afterwards have, take an eſtate in fee in the lands as tenants in common, and thoſe who die have an equal right with thoſe who live in the money bequeathed, *Bateman v. Roach*, 104

5. A will not atteſted by three witneſſes is void as to lands, but may be good to paſs a term of years. *Quære*, *Whitchurch v. Whitchurch*, 124, 125

6. A decree for confirming or avoiding a will, where an infant is heir or deviſee, is final, *Whitchurch v. Whitchurch*, 128

7. Contradictory clauſes in a will are to be ſo expounded, as that the whole may conſiſt, *Adams v. Clerke*, 154

8. A father makes a voluntary ſettlement on his family, without power of revocation inſerted, and afterwards makes a contrary diſpoſition by will, this will not affect the former ſettlement, *Boughton v. Boughton*, 212

9. *A.* by will directs 3000l. out of his ſtock in trade to be laid out in lands to be ſettled to the uſe of his firſt ſon in tail; and gave the reſidue of his joint ſtock and partnerſhip in trade to *B.* his executors, adminiſtrators, and aſſigns, and willed that he ſhould become partner with *C.* but declared the gift to *B.* to be in truſt for his daughter the wife of *C.* and to be at her ſeparate diſpoſal, notwithſtanding her coverture, and made his ſaid daughter ſole executrix: and there being no diſpoſition of the reſidue, it was DECREED, the daughter ſhould take the reſidue, notwithſtanding the bequeſt to her uſe; for that by this bequeſt in truſt the teſtator only intended his daughter a proviſion independent of her huſband, who he deſigned ſhould take the reſidue with his wife, *Newſtead v. Johnſon*, 242

WORDS.

1. The words "heirs of the body" or "iſſue," though ſtrictly words of *limitation*, yet may be words of *purchaſe*, *Hodſell v. Buſſell*, 237

2. In deeds, as well as wills, when it appears that the word "heirs" ſhould be underſtood as a word of purchaſe, the court of chancery will decree it ſo; *Hodſell v. Buſſell*, 238

3. A truſt declaring the benefit of a term to a *ceſtui que truſt*, "if ſhe ſhould ſo "long live," is of the ſame import as if it had been given "to her for life "only," *Hodſell v. Buſſell*, 239

4. A gift to *A.* "for life only, *et non alter*, and to the heirs or iſſue of his "body," here "heirs" or "iſſue" are words of purchaſe; for a conſtruction ſhall not be admitted to enlarge an eſtate contrary to the word "only," *Hodſell v. Buſſell*, 239

5. The words "heirs of the body" make a tail in freehold, or veſt the whole property in terms; from a preſumption of law, that it includes all heirs for ever; but when a limitation of a term is, "to the heirs of the body, and the "executor and adminiſtrator of ſuch "heirs," the preſumption is taken away, *Hodſell v. Buſſell*, 240

6. In what caſe the disjunctive "or" ſhall be taken to mean the conjunctive "and," *Walſh v. Patterſon*, 444

7. Words of contingency, *Jones v. Legg*, 461

8. "I give to my wife; and if ſhe has no "ſon nor daughter begotten by me, "and for want of ſuch iſſue, the eſtate "ſhall return to *John Wyld* and his "heirs,"

"heirs," "ſon and daughter" were held to be words of limitation, and the wife tenant in tail, *Wyld v. Lewis*, cited, 462 *notis*

9. Words of deviſe doubtful, *Bowles v. More*, 491

WRITS.

See PROCESS.

1. Where a reference is to the Judges on a caſe ſtated, no writ of error will lie, *Gore v. Gore*, 5

* When writs are to be ſuperſeded, and when quaſhed, *Woodcroft v. Kynaſton*, 308

Y.

YEAR-BOOK.

1. EDW. 3. pl. 14, 15.

Tenant for life, remainder in fee, &c.; the tenant for life made a leaſe to him in remainder for ſo many years as he (the remainder-man) ſhould live; then tenant for life died, and ſo did the remainder-man: adjudged, that his wife ſhould not be tenant by the curteſy, becauſe the poſſibility which the tenant for life had that the eſtate might revert to him had barred her of all right of dower, 151

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